Petition

81-419

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE OF TEXAS,
Petitioner
vs.
CLIFFORD JAMES BROWN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTION PRESENTED

Does a police officer run afoul of the Fourth Amendment, merely because he cannot see through the opaque packaging material being used, when he makes a warrantless seizure of a slightly bulging, tied-off balloon which he lawfully observes in plain view, where based on his professional experiences with the illicit narcotics trade, and in light of the circumstances of the exhibition of the balloon, he has probable cause to believe the balloon contains illegal drugs?

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B. The court below has required that an officer possess a degree of certainty far in excess of probable cause concerning whether an item in plain view contains contraband drugs, and is therefore subject to warrantless seizure, contrary to this Court's decisions in Coolidge v. New Hampshire, supra, and Payton v. New York, 445 U.S. 573. 12

C. The court below has given no legal significance to the inferences the police officer was able to draw based on his professional experience as he determined the likelihood that the tied-off balloon contained narcotics, contrary to this Court's decision in United States v. Cortez, __U.S. __. . 14

II.

The Texas court's decision that a police officer may not seize a tied-off balloon in circumstances like those here is in direct conflict with a decision of the

Supreme Court of Colorado. It also conflicts in principle with decisions of the highest courts of California, New York and the District of Columbia and of the Court of Appeals for the Ninth Circuit. 17

III.

This court should also resolve the federal question presented because police officers encounter these types of balloons--or other distinctive narcotics packages--on a daily basis, but under the interpretation of the plain view doctrine made by the Texas court they are constitutionally required to ignore circumstances which their professional experience and training tell them are violations of the law. 21

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE STATE OF TEXAS,
Petitioner

vs.

CLIFFORD JAMES BROWN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the Court of Criminal Appeals of Texas in the case of The State of Texas v. Clifford James Brown, number 65,431 in the court below, which reversed Respondent's conviction for possession of heroin.

OPINION BELOW

The opinion of the Court of Criminal Appeals is reported at 617 S.W.2d 196 and is reproduced in the Appendix.

JURISDICTION

A three-judge panel of the Court of Criminal Appeals of Texas rendered its decision reversing Respondent's conviction on March 25, 1981. Petitioner timely filed its motion for rehearing en banc, accompanied by its motion for leave to file for rehearing, as required by local rules. The en banc court denied the motion for leave to file for rehearing on July 1, 1981, three judges dissenting in a written opinion. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV of the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describ-

ing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Court of Criminal Appeals of Texas invalidated the warrantless seizure of an opaque, tied-off, heroin-filled balloon which was accidentally exhibited by Respondent to a police officer during the course of a valid, routine, fixed-location[1] driver's license check. The Texas court held this violated the "plain view doctrine" announced in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The theory below was that since the officer could not see inside the opaque balloon, he could not "know" what was inside, and therefore in the language of *Coolidge*, it was not "immediately apparent" to the officer that he had seizable contraband (drugs) before him.

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1. The court below upheld the validity of the license check. 617 S.W.2d at 200. The license check was of the "roadblock-type" in which all oncoming traffic was stopped, (SOF 9, 12, 15-16), as approved in *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, 673-74 (1979).

Facts Giving Rise to the Seizure

On the evening of June 18, 1979, Fort Worth, Texas, patrolman Harold Maples stopped Respondent's automobile during a routine fixed-location driver's license checkpoint operation. (SOF 11-13, 15).[2] When asked to exhibit his license, Respondent, the lone occupant of the car, reached in his right front pants pocket. After fumbling inside the pocket long enough to alarm the officer and cause him to shine his flashlight into the car, Respondent withdrew two objects. (SOF 15, 18-19). He was holding a dollar bill between his thumb and index finger, but wedged between the insides of his middle fingers was a small, green, opaque, tied-off balloon. (SOF 19, 22, 28, 41). The slightly bulging, tied-off portion of the balloon was about one-eighth of an inch thick and one-half inch long- about the size of a fingertip. (SOF 41-42). Officer Maples saw Respondent drop the balloon alongside his leg onto the car seat, at which time Respondent reached for and opened the glove box. (SOF 24-25). In the lighted glove box the officer observed numerous empty plastic vials, "a lot" of loose

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2. The designation "SOF" refers to the court reporter's transcription of the statement of facts at the suppression hearing in the trial court. The most pertinent portions of that testimony are reproduced in the Appendix.

white powder, and a bag of party balloons similar to the tied-off balloon Respondent had in his pocket. (SOF 25).

Officer Maples then asked Respondent to exit the vehicle, and as Respondent did so the officer again saw the tied-off balloon lying on the seat where Respondent had dropped it. (SOF 28). His professional instincts sufficiently aroused, Officer Maples reached into the car and seized the balloon, and in holding it noticed that it seemed to contain a powdery substance. (SOF 35). Based on his experiences as a police officer, Officer Maples believed that narcotics were in the balloon, and he placed Respondent under arrest for violation of the Texas Controlled Substances Act. (SOF 35). Later chemical analysis of the contents of the balloon showed that it contained heroin. (SOF 68).

Although not technically relevant to the legality of the seizure itself, a subsequent inventory of the car revealed a large jar of milk sugar in the rear floorboard, as well as a quantity of marijuana. (SOF 31).

Facts Giving Rise to the Officer's Belief, Amounting to Probable Cause, that the Balloon Contained Narcotics

Officer Maples had been a police officer approximately five years at the time of this incident. (SOF 5). He had participated in

several arrests in which narcotics had been kept in balloons similar to the one Respondent possessed, though Officer Maples had never been a narcotics officer per se. (SOF 21). He had made one arrest within the past year in which eight or nine such narcotics-filled balloons were recovered. (SOF 22). He had had conversations with fellow officers in which they discussed the fact that narcotics were often kept in such balloons. (SOF 22). From talks with drug users he was familiar with the narcotics-related uses of milk sugar. (SOF 50). He had heard from other persons that plastic vials such as those seen in the glove box were sometimes used for illegal narcotics, though he had not personally made a narcotics arrest involving that type of vial. (SOF 25-26). Officer Maples knew from his experience on patrol that the area of the license check had a medium degree of narcotics traffic. (SOF 55-56). The tied-off balloon, plus the items in the glove box, led him to believe that narcotics were present in the balloon. (SOF 25-26).

So obvious was it to experienced officers that the balloon contained drugs that when Officer Maples was asked what he said to his partner at the scene, he replied: *"I showed him what I had and I didn't have to say anything. He realized the situation then."* (SOF 29).

In addition, the police chemist who analyzed the contents of the balloon, and who had done such crime analysis for 19 years, stated that it was "very common" for him to analyze controlled substances kept in balloons like the one possessed by Respondent. (SOF 59-60, 68-69).

Procedural History

Respondent was indicted for possession of heroin, a second-degree felony under the Texas Controlled Substances Act, art. 4476-15, §§4.02(b)(2)(K), 4.04(a) and (b)(1), TEX. REV. CIV. STAT. ANN. He raised the issue of an unconstitutional warrantless seizure of the balloon in his motion to suppress evidence, which appears in the Appendix. Following an evidentiary hearing resulting in the denial of his motion to suppress by the trial court, Respondent entered a plea of nolo contendere pursuant to a plea bargain, and was sentenced to four years' imprisonment. Respondent's sole ground of error on appeal was the alleged illegality of the warrantless seizure of the balloon, and this was the only question addressed by the Court of Criminal Appeals (once it determined that Respondent had preserved his right to appeal the question in light of his plea of nolo contendere).

As noted previously, a panel of the Court of Criminal Appeals overturned the seizure on

the authority of *Coolidge v. New Hampshire*, *supra*, on the assumption that because the balloon was opaque, the officer could not *know* what was inside, and therefore it could not have been "immediately apparent" to him that illegal drugs were stored inside the balloon. The en banc court refused to address the merits of the State's motion for rehearing, over a written dissent by three of the nine judges.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF CRIMINAL APPEALS OF TEXAS HAS DECIDED THE FEDERAL QUESTION PRESENTED IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The court below has misconstrued the prior decisions of this Court by concluding that the opaqueness of a package or container is legally determinative of an officer's ability to conclude that seizable contraband is stored inside; by concluding that actual knowledge, rather than probable cause, of the seizable nature of such items is required before such a seizure is justified; and by failing to give any legal significance to the inferences drawn by the trained law enforcement officer as he made his determination that he had sufficient legal grounds for seizing the tied-off balloon at issue.

A. A tied-off balloon is the type of distinctive package or container that so clearly announces by its outward appearance that its contents are illegal drugs that it may be seized without a warrant if lawfully observed in plain view, under this Court's decisions in *Coolidge v. New Hampshire*, 403 U.S. 443, *Arkansas v. Sanders*, 442 U.S. 753, and *Robbins v. California*, ____ U.S. ___.

In *Coolidge v. New Hampshire, supra*, this Court held that officers may, without a warrant, seize contraband in "plain view" if: (1) the officer has a legitimate and prior justification for the intrusion (here the driver's license check operation); (2) the view of the object was inadvertent (here Respondent brought the balloon into view); and (3) it was immediately apparent to the officer that the item was seizable. Similarly, this Court has said in a recent per curiam opinion that officers may make a warrantless seizure of items observed in an automobile lawfully stopped on the public highways if they have probable cause to believe evidence of a crime is before them. *Colorado v. Bannister*, __ U.S. ____, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980). (The Court in *Bannister* did not cite *Coolidge*.)

Although technically not "plain view" cases, *Arkansas v. Sanders,* 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and *Robbins v. California,*_____ U.S._____, 101 S.Ct. 2841, ___ L.Ed.2d __ (1981), have addressed the issue of distinctive containers.[3]

In *Sanders* the Court noted that for some containers, such as gun cases or kits of burglar tools, the "contents can be inferred from their outward appearance." 442 U.S. at 764-65 n.13, 99 S.Ct. at 2593-94 n.13, 61 L.Ed.2d at 245 n.13. Similarly, in *Robbins* the Court said that a container may make its contents obvious to an observer by its "distinctive configuration, its transparency, or otherwise." ___ U.S. at ___, 101 S.Ct. at 2847, ___ L.Ed.2d at ___.

The Court strongly indicated in *Robbins* that California could have carried its burden of establishing that, to the police, plastic-wrapped bricks were distinctive signs

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3. This also is not exactly a "container case" since Respondent has never objected to the opening of the balloon and the analysis of its contents. He has attacked only the seizure itself. However, if the nature of the balloon sufficiently apprises the officers of its contents so as to permit a warrantless entry into the balloon, then *a fortiori* the mere seizure of the balloon would be reasonable under the Fourth Amendment.

of marijuana packaging had it developed a better record in the trial court. The California officer involved, however, had testified only to hearsay knowledge concerning such packaging. In this case, though, a full record was made establishing the meaning of a tied-off balloon to an experienced police officer. Petitioner believes this Court should address this petition on the merits to make clear the constitutional significance of such a factual record, and to clarify *Sanders* and *Robbins* on the "distinctive container" issue.

Indeed, the Court of Criminal Appeals had earlier addressed a situation similar to *Robbins* in *DeLao v. State*, 550 S.W.2d 289 (Tex. Crim. App. 1977). There officers made a plain view seizure of a heroin-filled balloon like that held by Respondent, but the State relied at trial only on common knowledge concerning the use of such balloons for narcotics storage. No testimony on such usage was offered. The Court of Criminal Appeals held this insufficient, but indicated the result would have been different had *any* record been made on this. 550 S.W.2d at 291. In Respondent's case such a record was made, but the Texas court held under federal law that the seizure was still improper. The court below will not change its stance on this issue without explicit direction from this Court.

B. The court below has required that an officer possess a degree of certainty far in excess of probable cause concerning whether an item in plain view contains contraband drugs, and is therefore subject to warrantless seizure, contrary to this Court's decisions in *Coolidge v. New Hampshire, supra*, and *Payton v. New York*, 445 U.S. 573.

As noted, one of the requirements under *Coolidge* for a warrantless plain view seizure is that it be "immediately apparent" to the officer that the item is contraband. 403 U.S. at 466, 91 S.Ct. at 2038, 29 L.Ed.2d at 583. Although this Court has never directly addressed the question of the precise degree of certainty required by the officer before he can make such a seizure, it said in *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 651 (1980), "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is *probable cause* to associate the property with criminal activity." (emphasis added). Probable cause requires that "the facts and circumstances within the [officer's] knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe" that evidence of a crime exists. *Berger v. New York*, 388 U.S. 41, 55, 87 S.Ct. 1873, 1881, 18 L.Ed.2d 1040, 1050 (1967).

Officer Maples believed as a result of his own professional experience and his discussions with fellow officers that the tied-off balloon contained narcotics, especially in light of the powder, balloons, and vials seen in the glove box, and the suspicious nature by which Respondent brought the balloon into and out of view. The court below, however, focused on the opaque nature of the balloon, and held that this prevented the officer from having sufficient certainty of what was inside the balloon. The Court below also said the officer had to "know" what was inside before seizure was possible. 617 S.W.2d at 200.

By requiring outright knowledge concerning the contents of the balloon, and by establishing in effect a per se rule of no knowledge when an opaque container is involved, the court below has held the officer to an improperly high standard of certainty. The court below is also obviously incorrect in thinking that the opacity of a container is determinative since this Court has said that transparency is only one factor that may determine whether an item is in plain view. *Arkansas v. Sanders, supra; Robbins v. California, supra.*

An officer does not have to be positive he is right before he can act. He need only

have sufficient legal cause for acting. Obviously Officer Maples did not know positively that narcotics were in the balloon, nor did he know positively what kind of narcotics would be inside. The officer candidly conceded this. (SOF 34, 47).

However, if Officer Maples had arrived at a shooting scene and observed a pistol next to a dead body, surely he would be entitled under a plain view rationale to seize the pistol even though extensive laboratory testing might be required to reveal if the pistol were the murder weapon, or even if a murder had occurred at all. *Cf. Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Officer Maples was in a similar position here. See 617 SW2d at 201 n.2 (dissenting opinion).

This Court should review this case to resolve confusion concerning the degree of certainty required of an officer before he can make a plain view seizure.

C. The court below has given no legal significance to the inferences the police officer was able to draw based on his professional experience as he determined the likelihood that the tied-off balloon contained narcotics, contrary to this Court's decision in *United States v. Cortez*, ____ U.S.____.

In *United States v. Cortez*, ____ U.S. __, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), involving the standard for the temporary detention of persons in a border stop context, the Court recognized the need to give weight to the deductions of trained law enforcement personnel as their reason for acting is reviewed by the courts. This Court said:

> ...when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person--and for action on that suspicion.

___ U.S. at ___, 101 S.Ct. at 695, 66 L.Ed.2d at 629. Also *Coolidge* itself states that items in plain view are seizable if it is immediately apparent *to the police* that they are contraband. 403 U.S. at 466; 91 S.Ct. at 2038; 29 L.Ed.2d at 583.

Petitioner believes this Court should hold the *Cortez* rationale equally applicable to seizures of property. Dicta in *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 367, 369, 92 L.Ed. 436, 440 (1948), noted that the distinctive odor of burning opium, detected by a knowledgeable officer, would be "most persuasive" regarding probable cause for a search warrant.

The significance of the tied-off balloon might have been lost on the layman. Perhaps its true meaning would have even been overlooked by appellate lawyers such as ourselves. But the appearance of that balloon certainly meant a great deal to the veteran officers on the scene--so much in fact that they knew by sight alone what the balloon meant; no talk among themselves was required.

The opinion of the panel below--unlike the dissenting opinion--gave absolutely no legal weight to, and in fact ignored, the extensive testimony by the officer concerning his prior professional experience with tied-off balloons. Instead the panel seized on a few isolated lines of testimony in which the officer remarked that he had never personally made a narcotics arrest involving plastic vials. The State stressed to the court below the applicability of *Cortez*, but to no avail.

As the dissent notes, Texas has in effect held, contrary to *Cortez*, that an officer's training and experience form no basis for justifying his belief that property in plain view is contraband. 617 S.W.2d at 203 n.4. Petitioner believes that the misapprehension of the law in this regard by the court below is so serious that standing alone it calls for the granting of the writ.

II.

THE TEXAS COURT'S DECISION THAT A POLICE OFFICER MAY NOT SEIZE A TIED-OFF BALLOON IN CIRCUMSTANCES LIKE THOSE HERE IS IN DIRECT CONFLICT WITH A DECISION OF THE SUPREME COURT OF COLORADO. IT ALSO CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE HIGHEST COURTS OF CALIFORNIA, NEW YORK AND THE DISTRICT OF COLUMBIA AND OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

In *People* v. *Montoya*, 185 Col. 299, 524 P.2d 76 (1974), state officers stopped a vehicle driven by an individual who had just exited a house as the officers were approaching it to execute a search warrant. As one officer neared the car he saw that the defendant had his hand jammed between the seat and seat back. As the defendant withdrew his hand, the officer observed several balloons pop out of the seat crevice and into view. Believing from his experience that the balloons contained heroin, the officer seized them. The Colorado Supreme Court held this to be a valid plain view seizure.

Likewise, the Ninth Circuit has upheld the seizure of heroin-filled condoms seen in a motel room at the time of a narcotics arrest, the officer having testified that balloons, finger stubs, and condoms were known to him to be common methods of packaging heroin.

Ponce v. *Craven*, 409 F.2d 621 (9th Cir. 1969). *Redmon* v. *United States*, 355 F.2d 407 (9th Cir. 1966), reached the same conclusion where probable cause to arrest was the issue. *Accord: State* v. *McCrary*, 478 S.W.2d 349 (Mo. Sup. 1972) (heroin-filled condoms properly seized during search incident to arrest).

Other courts have also examined similar situations involving analogous kinds of packaging peculiar to the illegal drug trade. These courts have upheld the officer's belief that he had probable cause for the arrest or seizure where the record established that the container was typically used to package illicit drugs in the area and that the officer knew of that fact, and where other factors--such as surreptitious handling of the item or the degree of drug trafficking in the area further enhanced the officer's belief that drugs were inside the container.

The Supreme Court of California has decided a strikingly similar case, except that the drug was cocaine and the package was a "paper bindle." *People* v. *Lilienthal*, 22 Cal.3d 891, 150 Cal. Rptr. 910, 587 P.2d 706 (1978). As the accused was looking for his driver's license after being stopped for a traffic violation, a distinctively folded square of paper fell from his wallet, which he then tried to cover with his foot. The officer seized the bindle because he had made

numerous arrests where heroin and cocaine had been packaged in such distinctively-folded packets. The California court upheld the seizure, noting that reasonable grounds for believing that a package contains contraband may be afforded by the package's shape, design and the manner in which it is carried.

The New York Court of Appeals has said that a glassine envelope is a "telltale sign of heroin," and that the observation of such packages by a knowledgeable officer, coupled with such actions as disposal of the items on the officer's approach, provides probable cause for the seizure of such envelopes. *People* v. *Alexander*, 37 N.Y.2d 202, 371 N.Y.S.2d 876, 877, 333 N.E.2d 157 (1975). The same court also recognized that the passing of a glassine envelope in public is the "hallmark" of an illicit drug transaction which all but constitutes per se probable cause to arrest. *People* v. *McKay*, 51 N.Y.2d 594, 435 N.Y.S.2d 679, 685, 416 N.E.2d 1015 (1980).

Finally, in *Price* v. *United States*, 429 A.2d 514 (D.C. Ct. App. 1981), the court upheld probable cause for a warrantless arrest where an officer observed the accused take certain unusual actions with regard to a manila "coin envelope," a form of packaging which the officer said had been used for narcotics storage in about 20% of the narcotics arrests he made.

All of these seizures or arrests have involved forms of packaging which, with the possible exception of the coin envelope in *Price*, were not just characteristically, *but singularly*, associated with illegal narcotics trafficking. While one could conjure up examples of items that could be kept in a tied-off balloon, it is well nigh impossible to think of anything, other than narcotics, that is actually stored in such a manner in everyday life.[4] In any event, narcotics would not have to be the only possible substance inside the balloon before the officer could act. For example, a gun case, which this Court mentioned as the type of container which announces its content by its outward appearance, might in fact contain only a fishing rod or a pool cue--or it might just be empty. None of those possibilities would destroy the officer's right to seize in an appropriate plain view situation.

This Court should take this opportunity to announce which courts have correctly de-

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4. As one intermediate court observed, the only things one could realistically expect to find in a balloon, other than narcotics, are air, helium, or water--none of which it was thought would carry any incremental reasonable expectation of privacy. *People v. Jenkins*, 165 Cal. Rptr. 361 (Ct. App. 1980) (cocaine).

cided this issue, since the Texas decision appears to be in complete disharmony with the decisions of other jurisdictions[5] faced with similar questions.

III.

THIS COURT SHOULD ALSO RESOLVE THE FEDERAL QUESTION PRESENTED BECAUSE POLICE OFFICERS ENCOUNTER THESE TYPES OF BALLOONS--OR OTHER DISTINCTIVE NARCOTICS PACKAGES--ON A DAILY BASIS, BUT UNDER THE INTERPRETATION OF THE PLAIN VIEW DOCTRINE MADE BY THE TEXAS COURT, THEY ARE CONSTITUTIONALLY REQUIRED TO IGNORE CIRCUMSTANCES WHICH THEIR PROFESSIONAL EXPERIENCE AND TRAINING TELL THEM ARE VIOLATIONS OF THE LAW.

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5. Intermediate state courts have also reached conclusions contrary to that of the Texas court. *State v. Washington,* 17 Ariz. App. 207, 496 P.2d 633 (1972) (balloons --heroin); *People v. Jenkins, supra* (balloon--cocaine); *People v. Simmons,* 19 Cal.App.3d 960, 97 Cal.Rptr. 283 (1971) (balloon--heroin); *People v. Clayton,* 13 Cal.App.3d 335, 91 Cal.Rptr. 494 (1970) (paper bindle--heroin); *People v. Garcia,* 541 P.2d 1268 (Col.Ct.App. 1975) ("wrapped" balloon--heroin; justifies seizure on sight alone); *State v. Broadnax,* 25 Wash.App. 704, 612 P.2d 391 (1980) (balloon-- heroin).

One need not cite authority for the proposition that illicit drug use is epidemic. Police officers frequently encounter tied-off balloons of the type possessed by Respondent --especially in a large state such as Texas, with its many urban areas and its proximity to the Mexican border. In view of the Court of Criminal Appeals' interpretation of plain view doctrine, Texas officers have no way to seize such narcotics packages or to arrest those in possession of them. In essence, they must shut their eyes to apparent violations of the drug laws.

Petitioner can think of no legal doctrine to ameliorate the problem. Since this case presents only a question of the legal sufficiency of probable cause, in a plain view context, resort to a magistrate will be of no avail. The magistrate will have no additional facts available to him, and in fact would have to rely on the deductions which the officer drew from the nature of the packaging, but which the Texas court has held legally insufficient in spite of *Cortez*. A "temporary detention" of the balloon will yield nothing because officers will never "know" more than they did here--that they have a tied-off balloon containing a powdery substance.

Unless this Court undertakes plenary review of this case, seizure of these types of

containers will be forever foreclosed in the state of Texas.

CONCLUSION

Full review of this case will give needed clarification on the issues set out above: the applicability of *United States v. Cortez* to seizures of property; the precise degree of certainty required of an officer as he makes a plain view seizure; and a concrete ruling on the kinds of distinctive packages or containers subject to seizure, and inspection, under *Robbins v. California* and *Arkansas v. Sanders*. For these reasons Petitioner asks that a writ of certiorari issue to review the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

L.T. WILSON, Assistant
Criminal District Attorney
Chief of the Criminal Division

C. CHRIS MARSHALL, Assistant
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Appendix

Opinion of the Court of Criminal Appeals of Texas

CLIFFORD JAMES BROWN, Appellant

NO. 65,431 v. --- Appeal from TARRANT County

THE STATE OF TEXAS, Appellee

O P I N I O N

This appeal is taken from a conviction on appellant's plea of nolo contendere to the offense of possession of heroin. The trial court assessed punishment at four years imprisonment pursuant to a negotiated plea bargain. On December 11, 1979 the trial court conducted a hearing on appellant's motion to suppress. Immediately following the trial court's denial of that motion, appellant was then tried before the judge, and his plea of nolo contendere was entered. During his trial on the merits the evidence adduced at the pretrial hearing was offered into evidence as a stipulation. In appellant's sole ground of error he complains that the trial court erred in denying his motion to suppress because the evidence was seized in contravention of the Fourth Amendment of the United States Constitution, and the Texas Constitution, Article I, §9. Appellant contends that the search was

conducted without a warrant, and does not come within any recognized exception to the warrant requirement. The State urges that the "plain view" exception to the warrant requirement should apply here.

However, in order to determine if we may reach this ground of error we must initially delve into the provisions of Article 44.02, V.A.C.C.P.[1]

At the outset we note that Article 44.02, supra, specifically applies with equal force to either pleas of guilty or pleas of nolo contendere, in which there has been a plea

---

1. Article 44.02 provides that "A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial...." And such an accused must be so admonished pursuant to Article 26.13(a)(3), V.A.C.C.P.

bargain accepted by the trial court.[2] See Article 27.02(6), V.A.C.C.P., Sowell v. State, 503 S.W.2d 793, 795 (Tex. Cr. App. 1974) and Lucero v. State, 502 S.W.2d 750, 752 (Tex. Cr. App. 1973). Secondly, an erroneous ruling on a motion to suppress will not vitiate a conviction where the evidence sought to be suppressed is not introduced, and the nolo contendere plea is supported by independent evidence, other than that contested by the motion Ferguson v. State, 571 S.W.2d 908, 909 (Tex. Cr. App. 1979), and Brewster v. State, 606 S.W.2d 325, 328 (Tex Cr. App. 1980), and cases cited therein.

Here, although the heroin itself was not introduced, there was the stipulated testimony of the chemist who analyzed the contents of a particular green balloon. This testimony is also the fruits of the arrest and search, *Brewster*, supra, at 328.

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2. In Prochaska v. State, 587 S.W.2d 726 (Tex. Cr. App. 1979) we held that where there is no plea bargain pursuant to Article 44.02, supra, any claimed deprivations of constitutional guarantees against unreasonable searches and seizures and defective confessions are waived by entering a plea of guilty, and thereby reaffirmed the rule of Helms v. State, 484 S.W.2d 925, 927 (Tex. Cr. App. 1972).

As to the question of any independent evidence which remains unchallenged and whether it is sufficient to support a conviction, we wrote in *Brewster*, supra at 328:

> "The review exercise is much like the search of the appellate record for a judicial 'confession' or 'admission' deemed adequate to show guilt notwithstanding an unauthorized oral stipulation, a flawed written stipulation or some similar defect in evidencing guilt. See the exhaustive treatment, pro and con, in Dinnery v. State, 592 S.W.2d 343 (Tex. Cr. App. 1980). . . ."

Our search of the record in this case reflects that the evidence introduced at the pretrial hearing primarily consisted of the testimony by the arresting officer, Patrolman Maples. The only other witness called was the director of the crime laboratory of the Fort Worth Police Department, who appeared as the result of appellant's subpoena. His testimony consisted largely of a report of the items seized, and that, among other things, there were two balloons found to be containing a powder; one was identified to be heroin, and one was not. Appellant did not take the stand and, as mentioned, his trial was held immediately thereafter.

During this trial appellant made no oral or written stipulations of evidence that could

be characterized as a judicial confession, i.e., there is no statement that the allegations of the indictment were true and correct. Neither was he sworn in as a witness before the careful trial judge admonished him and then accepted his plea of nolo contendere and the negotiated plea bargain. Cf. Dinnery v. State, 592 S.W.2d 343 (Tex. Cr. App. 1980). In fact, great care was taken to inform appellant of his right to appeal the ruling, as the following excerpt from the transcription of the court reporter's notes demonstrates:

"THE COURT: All right.

Now, the Court finds that prior to your entering your plea of nolo contendere in this case, this Court conducted a hearing in open Court on the record in regard to the motion filed on your behalf by your attorneys, same being a Motion to Suppress the Evidence.

The Court further finds as a fact that at the hearing and trial on your plea of nolo contendere, that you did not take the witnes stand and did not judicially confess to the offense charged against you in this Indictment.

It is the understanding of the Court, therefore, that though you do

not have a right to appeal for your conviction on your plea of nolo contendere in this case, you do have a right to appeal this Court's decision on the Motion to Suppress.

Now, those being the circumstances, do you wish at this time to give notice of your intention to appeal this conviction and the Court's decision, or do you wish to waive that right as you waived your right to a trial by jury?

THE DEFENDANT: "I want to appeal."

Thus we hold that appellant has successfully navigated the procedurally hazardous passageway of Article 44.02, supra, and preserved his right to appeal denial by the trial court of his motion to suppress. Having reached the search and seizure issue, we now reverse the ruling of the trial court, because we believe that the instant seizure cannot be validated on the strength of the facts before us.

The facts show that Officer Maples stopped appellant's 1970 Buick on the evening of June 18, 1979 as part of a routine and nonrandom license check being operated in the 1200 block of East Allen Street in East Fort Worth.

When asked to produce his driver's license, appellant put his hand into the right front pocket of his trousers. On direct examination, Patrolman Maples testified as follows:

> "Q. [Prosecutor]: When he put his hand in his pocket, did you do anything with the flashlight?
>
> A. Not immediately, I didn't.
>
> Q. All right.
>
> Was there -- you say not immediately. Did you at some point in time shine the light in the car?
>
> A. Yes, sir, I did.
>
> Q. All right, and why did you do that?
>
> A. His hand was in his pocket too long and it worried me.
>
> * * *
>
> Q. All right, and he pulled his hand partially out of his pocket. Was there anything in his hand?
>
> * * *

A. There were two items. There was a, what I believe was a dollar bill that was partially folded and there was a small green balloon stuck between his fingers."

On cross examination the following testimony was elicited:

"Q. [Defense Attorney]: Now, basically, as a matter of fact, your arrest of Clifford James Brown was based on your suspicion that he did have a controlled substance in that balloon; is that correct?

A. Yes, sir, that is.

Q. Could you describe the size of the balloon for us, Officer?

A. It was tip end of a -- I can't -- well, it was a balloon, probably would be about as large, you know -- not filled with anything -- just my little finger and it was just about that much (indicating) of the tip end of a balloon.

Q. When you say that much, could you give the reporter an estimate of the size and length that you are talking about?

A. Probably mashed down the balloon was maybe probably less than an eighth of an inch, but it was probably half of an inch long, maybe, from the tip to where it's tied.

Q. Is that what you based your arrest of this gentleman on?

A. Yes, sir.

Q. The sight of that balloon?

A. Yes, sir, that's correct.

Appellant then looked in the glove compartment of the car, still seeking his driver's license; as he did so the officer testified that he saw some empty plastic vials, a white powdery substance which was later determined not to be a controlled substance, and a bag of party balloons. More importantly on direct examination, the officer candidly admitted the following:

Q. [Prosecutor]: All right.

Have you ever made any arrests personally or been involved in any sort of situations where arrests were made where narcotics were stored in a plastic vial of the same nature that you saw in the glove box?

A. Personally I haven't seen it in the plastic vials."

After the green balloon was dropped on the seat, Patrolman Maples ordered appellant to exit the car; he then reached in the car and seized the green balloon.

We do not here question either the validity of the officer's initial stop of appellant's vehicle as a part of a license check. Cf. Faulkner v. State, 549 S.W.2d 1 (Tex. Cr. App. 1976), nor the propriety of the arrest since appellant failed to produce a driver's license. What we *do* question is the sole argument advanced by the State that the green balloon seized was in "plain view" incident to a lawful arrest.

Significantly, the state overlooks the first limitation on the "plain view" doctrine: "[T]hat plain view *alone* is never enough to justify the warrantless seizure of evidence." [Emphais in original] Coolidge v. New Hampshire, 403 U.S. 443, 468, 91 S.Ct. 2022, 2039, 29 L.Ed.2d 564 (1971).

For the plain view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. This "immediately apparant" aspect is central to the plain view exception and is here relied on by appel-

lant.[3] *Howard* and *Coolidge,* both supra. In this case then, Officer Maples had to know that "incriminatory evidence was before him when he seized the balloon." DeLao v. State, 550 S.W.2d 289, 291 (Tex. Cr. App. 1977).

In Duncan v. State, 549 S.W.2d 730, 732 (Tex. Cr. App. 1977) the Court wrote:

> "Even though we are aware of the popular use of plastic bags as containers for controlled substances we cannot hold that the bag itself is contraband in the absence of some showing that the officer saw what appeared to be a contraband substance in the bag."

---

3. As we wrote in Howard v. State, 599 S.W.2d 597, 600 (Tex. Cr. App. 1979): "While this Court continues to revisit the *Taylor* doctrine [from Taylor v. State, 421 S.W.2d 403, 407 (Tex. Cr. App. 1967] from time to time, see, e.g., Duncantell v. State, 563 S.W.2d 252, 256 (1978), it has examined each precise fact situation to determine that after the traffic stop each movement made by an officer is factually and legally justified..." See also cases cited in n.8, in *Howard,* supra, for similar examinations of the record.

Similarly, Nicholas v. State, 502 S.W.2nd 169 (Tex. Cr. App. 1973) dealt with the seizure of photographic negatives; in *DeLao v. State*, supra, at 291, the Court held that substance inside a red balloon on a window sill was not in plain view.

Finally, in *Howard*, supra, at 602 we wrote:

> "Officer Holland testified that given the translucent quality of the container, it was impossible to determine the nature of the tablets therein. It is therefore clear that at the moment that the container came into 'plain view' Officer Holland had no basis for believing that its contents were inherently suspicious or that they were in fact contraband."

We hold here that opaque party balloons are to be accorded treatment similar to plastic bags and photographic negatives and translucent vials. Appellant's ground of error is sustained, and the cause is reversed and remanded.

CLINTON, Judge

(Delivered March 25, 1981)

BY: Panel 3, 4th Quarter, 1980, composed of:

Truman E. Roberts, Judge
Wendell A. Odom, Judge
Sam Houston Clinton, Judge

DISSENTING OPINION TO DENIAL OF LEAVE TO FILE STATE'S MOTION FOR REHEARING

On original submission, a panel of this Court reversed this conviction because an officer did not have probable cause to seize a balloon filled with heroin. The panel contends that "opaque party balloons are to be accorded treatment similar to plastic bags and photographic negatives and translucent vials." Thus, the presence of a balloon in plain view alone did not give an officer sufficient facts to make it "immediately apparent" that the balloon contains contraband.

The basic premise in any warrantless search and seizure case is that they are per se illegal, except for a few specifically established and well-delineated exceptions. Katz v. United States, 359 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is also well established that under certain circumstances the police may seize evidence in plain view without a warrant, Coolidge v. New Hampshire,

403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). However, the doctrine of "plain view" does have three criteria: (1) a prior justification for an intrusion; (2) an inadvertent discovery of incriminating evidence; (3) which is immediately apparent *to the officer*. Coolidge v. United States [sic], supra.

More recently, the United States Supreme Court held in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), that:

> ". . . The seizure of property in plain view involves no invasion of privacy and *is presumptively reasonable*, assuming that there is *probable cause to associate the property with criminal activity* . . . . (Emphasis added) 100 . S.Ct. at 1380.

Therefore, our judicial inquiry focuses upon the State's ability to prove the officer has probable cause to *associate* the party balloon with criminal activity.[1]

Probable cause in our context requires that "the facts and circumstances within the (officer's) knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe" that the balloon contained contraband. Berger v. New York, 388 U.S. 41, 55, 87 S.Ct. 1873, 1881, 18 L.Ed.2d 1040, 1050 (1967); Barber v. State, 611 S.W.2d 67 (Tex. Cr. App. 1981). The issue turns to whether an officer, relying on years of practical experience and knowledge commonly

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1. A type of item used in the storage or transportation of contraband, or that item's transparency or opacity should be supporting facts, but not be controlling issues. The controlling facts derive from the surrounding circumstances to support or reject the "probable cause" for the seizure. See, Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); Reeves v. State, 597 P.2d 727 (Alaska 1979). Having said this, however, some objects may be so closely associated with criminal activity as to support the probable cause element by themselves.

accepted, has probable cause to seize the balloon in plain view.[2]

As more aptly stated by the United States Supreme Court, these principles are:

> ". . .imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person -- and for *action* on that suspicion." (Emphasis added)

United States v. Cortez, ___ U.S. ___ , 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981). Accord, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 693 (1975).

Under *Cortez*, the objective and seemingly innocuous fact of a tied-off balloon combined with the permissible deduction that

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2. The plain view doctrine does not require an officer to have absolute proof of the incriminating nature of the balloon. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Only a chemical analysis could prove the contents to be contraband.

it is commonly linked to heroin forms a legitimate basis to the trained law enforcement officer for suspicion. This legitimate suspicion supports the probable cause element to "associate the (balloon) with criminal activity." Payton v. New York, supra. Thus, under the facts of our case, the seizure of the balloon in "plain view" is presumptively reasonable and should be upheld.

Indeed, this Court's prior decisions accepted such logic. In DeLao v. State, 550 S.W.2d 289 (Tex. Cr. App. 1977), we held:

> "The State urges that it is a well known fact that heroin is kept in balloons. The *officer's testimony, however, does not demonstrate that he was cognizant of this 'well known' fact or immediately aware that heroin was in the balloon at the time of the seizure.* Coolidge v. New Hampshire, supra; Nichols v. State, supra [502 S.W.2d 169 (Tex. Cr. App.)]. *The seizure must be based on what was known by the officer at the time he acted,* yet this record contains not a scintilla of evidence that the officer knew what the State now alleges in its brief on appeal is a 'well known' fact. The *burden was on the State to show facts authorizing the seizure here challenged. Had the State pro-*

> *duced any evidence on this issue, there might have been shown a basis for its claim on appeal, but this was not done."* (Emphasis added) 550 S.W.2d at 291.

More importantly is the explicit holding of Simpson v. State, 486 S.W.2d 807 (Tex. Cr. App. 1972). In *Simpson*, this Court unanimously upheld a warrantless seizure of "capsules" of heroin because the arresting officer recognized them as contraband. *DeLao* and *Simpson* both recognize the validity and importance in the experience and training of law enforcement officers.

These cases are clearly distinguishable from the photographic negative and translucent vial cases. Photographic negatives can and do represent such diverse subject matters that they can not warrant a "man of reasonable caution" to believe they contain contraband. Similarly, translucent vials which commonly contain legally obtained prescriptions render the presence of contraband vague and uncertain. The officer knows the vials contain drugs or even narcotics for that is their purported use. However, without other supporting facts, it is this inherent use that prevents the "man of reasonable caution" from having probable cause to believe the presence of contraband. Photographic negatives and translu-

cent vials do not permit permissible deductions that contraband is present. United States v. Cortez, supra.

Such is not the case of tied-off balloons in plain view. The use of balloons or similar containers has been shown to be commonly associated with the distribution, packaging, and transportation of controlled substances -- usually heroin. See, e.g., State v. Washington, 496 P.2d 633 (Ariz. App. 1972) (balloons); State v. Grady, 548 S.W.2d 601 (Mo. App. 1977) (condoms); State v. James, 169 So.2d 89 (La. 1964) (finger stalls). Many jurisdictions have recognized the realities of the drug culture and hold that balloons are a common package for heroin. The view I advocate is neither novel or unique. Other jurisdictions have held that a rolled, tied-off balloon *supports probable cause* and, if seen in plain view, can be validly seized under the Fourth Amendment. Pounce v. Craven, 409 F.2d 621 (9th Cir. 1969); People v. Montoya, 524 P.2d 76 (Colo. 1974); State v. Broadnax, 612 P.2d 391 (Wash. App. 1980); People v. Simmons, 97 Cal.Rptr. 283 (Cal. App. 1971); People v. Garcia, 541 P.2d 1268 (Colo. App. 1975); also see, Commonwealth v. Lawson, 309 A.2d 391 (Pa. 1973); Reeves v. State, 599 P.2d 727 (Alaska 1979). Furthermore, balloons have become so well known for their relation to narcotics that they have

been included in the Model Drug Paraphernalia Act (MDPA) and legislatively adopted.[3] See, Mid-Atlantic v. Maryland, 500 F.Supp. 834 (Md. D. 1980).

Accordingly, I would hold the seizure in plain view valid because: (1) the officer had a legitimate and prior justification for an intrusion into appellant's car (routine and non-random license check); (2) the discovery of the balloon was inadvertent; and (3) the incriminating nature of the balloon was immediately apparent *to the officer*. DeLao v. State, supra. At trial, the officer testified that the rolled, tied-off, opaque balloon was mashed down to approximately one-eighth of an inch thick and one-half inch in length. Based on this specific knowledge and prior experience with the drug culture, the officer associated the balloon with contraband. The

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3. Texas has recently amended the Controlled Substances Act by adding a new subsection which classifies as paraphernalia a "balloon . . . used or intended for use in packaging small quantities of a controlled substance." V.T.C.A. Article 4476-15, Section 1.02(29)(I) (effective September 1, 1981). For other jurisdictions that have adopted similar provisions, see, Mid-Atlantic v. Maryland, supra.

balloon, in plain view, formed "a legitimate basis for suspicion . . . and for action on that suspicion. United States v. Cortez, supra, at 695; DeLao v. State, supra.[4]

I respectfully dissent.

McCormick, Judge

(Delivered July 1, 1981)

En Banc

Dally, J., and W. C. Davis, J., join in this dissent.

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4. Although the panel relies in part on DeLao v. State, supra, that case is clearly distinguishable. *DeLao*, however, is supportive of there being sufficient evidence to support the probable cause element to associate the balloon with criminal activity. The panel opinion overrules that language in *DeLao* expressing this Court's belief that an officer's experience and training forms a basis for justifying the seizure.

Suppression Motion in the Trial Court and Incorporated Order Denying the Motion

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NO. 17586

THE STATE OF TEXAS	I	IN THE 213TH JUDICIAL
VS.	I	DISTRICT COURT OF
CLIFFORD JAMES BROWN	I	TARRANT COUNTY, TEXAS

DEFENDANT'S FIRST MOTION TO SUPPRESS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CLIFFORD JAMES BROWN, Defendant in the above entitled and numbered cause, by and through his attorneys of record, DON CARTER and ALLAN K. BUTCHER, and files this his First Motion To Suppress all evidence seized by officers of the Fort Worth Police Department in a search of an automobile driven by the Defendant on June 18, 1979 in the City of Fort Worth, Tarrant County, Texas. In support of this motion the Defendant would respectfully show the Court as follows:

On June 18, 1979, a vehicle driven by the Defendant was ordered by officers of the Fort Worth Police Department to stop and he and the vehicle were subjected to a search by said officers.

2.

As a result of this search, officers of the Fort Worth Police Department claim to have seized the following evidence from the person or vehicle driven by the Defendant:

a. A tape-sealed envelope holding a tape-sealed plastic bottle with a balloon containing powder.

b. Tape-sealed envelope holding five tape-sealed plastic bags, each with plant substance.

c. Tape-sealed envelope holding a plastic bottle with powder.

d. Tape-sealed envelope holding a balloon with powder.

e. Tape-sealed evelope holding a tape-sealed box with four plastic bottles, nine plastic caps and powder residue.

f. Tape-sealed bottle of powder and a sack.

g. Torn sack containing balloons and a plastic bag with balloons.

h. A knife, two spoons, bottle opener, two plastic packages of cigarette papers a key, one dollar bill, one nickel, plastic bottles and caps.

3.

The above described search was unreasonable and illegal in violation of the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution, because it was conducted without a search warrant. This search did not come within any recognized exception to the constitutional requirements of a warrant.

PRAYER

WHEREFORE, the Defendant prays that the Court grant this motion and suppress all evidence seized as a result of the search of the Defendant and the vehicle he was driving on June 18, 1979. The Defendant prays that he be given a hearing on this motion.

Respectfully submitted,

/s/ DON CARTER

DON CARTER
The Summit Building
1500 W. 5th Street
Fort Worth, Texas 76102

/s/ ALLAN BUTCHER

ALLAN BUTCHER
One Tandy Cntr. Suite 711
Fort Worth, Texas 76102

ORDER

BE IT REMEMBERED that the foregoing Defendant's First Motion to Suppress was presented to the Court on the 11 day of December. 1979, and it is therefore ordered that the motion is hereby DENIED.

DONE AND ENTERED this 11 day of December 1979.

/s/ TOM CAVE
JUDGE PRESIDING

Judgment and Mandate of the Court of Criminal Appeals, Including Order Regarding the State's Motion for Rehearing

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TRIAL COURT NO. 17,586

THE STATE OF TEXAS

To the 213th JUDICIAL DISTRICT COURT OF TARRANT County, Greeting:

Before our Court of Criminal Apepals, on the 1st day of July A.D. 1981, the cause upon Appeal to revise or reverse your judgment between

CLIFFORD JAMES BROWN Appellant,

NO. 65,431

VS.

THE STATE OF TEXAS, Appellee,

was determined, and therein our said Court of Criminal Appeals made its order in these words:

"This cause came to be heard on the Transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be reversed and the cause remanded for further proceedings in accordance with the opinion of this Court and that this decision be certified below for observance."

The Motion for Leave to File State's Motion for Rehearing is Denied.

WHEREFORE, we command you to observe the order of our said Court of Criminal Appeals, in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said Court of Criminal Appeals, with the seal thereof annexed, at City of Austin, Texas, this 3rd day of July, A.D. 1981.

THOMAS LOWE
Clerk

/s/ Belva Myler
Deputy Clerk

Excerpts of Testimony at Suppression Hearing

NO. 17586

THE STATE OF TEXAS	I I	IN THE 213TH JUDICIAL
VS.	I	DISTRICT COURT OF
CLIFFORD JAMES BROWN	I I	TARRANT COUNTY, TEXAS

- - -

BE IT REMEMBERED that on the 11th day of December, A.D. 1979, came on to be heard the Hearing on Motion to Suppress and Plea of Guilty in the above entitled and numbered cause before Honorable Tom Cave, Judge presiding, and Defendant, Counsel for Defendant, Counsel for State having announced ready, the following proceedings were had, to wit:

- - -

APPEARANCES:

For the State:

Hon. John Bankston
Assistant District Attorney
Criminal Justice Building
Fort Worth, Texas

For the Defendant:

Hon. Don Carter
Attorney at Law
1500 West 5th Street
Fort Worth, Texas

and

Hon. Allan K. Butcher
Attorney at Law
3309 Winthrop Avenue
Fort Worth, Texas

. . . . [2]

HAROLD TOM MAPLES

called as a witness for the State, having been first sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BANKSTON [Prosecutor]:

Q. State your name, please?
A. Harold Tom Maples.
Q. All right.
Mr. Maples, how are you currently employed?

A. I'm a police officer with the City of Fort Worth.

Q. And how were you employed on June the 18th, 1979, sir?

A. As a patrol officer in the police department.

Q. And how long have you been employed in that capacity?

A. Little over five and a half years.

[4]

Q. All right.

Is that of today or is that as of June 18, 1979?

A. It would have been five years just a month or so after.

Q. As of today or as of June 18th?

A. As of June the 18th.

Q. All right.

[5]

. . . .

Q. Officer Maples, I would like to ask you whether or not on June the 18th, 1979, sometime that evening there at 1200 block of East Allen Street, you had an occasion to stop a '70-model Buick 4-door?

A. Yes, sir.

Q. Brown Buick?

A. Yes, sir, I did.

Q. And was there one or more persons in the car?

A. There were one -- there was one person in the car.

Q. And did you have a conversation with

the person in

[15]

that car?

A. Very brief.

Q. All right, and what did you tell him?

A. I -- just what I told everybody. Can I see your driver's license.

Q. All right, and at that time you were asking the driver of that car for his driver's license, did you know who he was?

A. No, sir.

Q. Had you ever seen him before?

A. No, sir.

Q. Did you have any kind of list with you that evening of persons to be on the lookout for, known narcotics users, for example?

A. No, sir.

Q. Is the man seated here to the right of Mr. Carter the man who was in that car you stopped? That '70 Buick?

A. Yes, sir, it is.

[16]

. . . .

[Q]. When you asked the Defendant for his driver's license, did he say anything to you?

A. No, sir, not that I remember.

Q. All right.

Did he do anything in response to your -- your question for his driver's license?

[17]

A. Yes, sir, he did.

Q. And what did he do, sir?

A. He took his right hand, put it in the front pant's pocket.

Q. Took his right hand and put it in his front pocket?

Now, would that be the right pocket or the left pocket?

A. It would be his right pocket.

Q. Took his right hand, put it in his right pocket?

A. Yes, sir.

Q. All right.

At the time he was reaching in his pocket, where were you, sir?

A. I was standing directly in front of his -- the driver's door facing him.

Q. Did you have your flashlight in your hand?

A. Yes, sir, I did.

Q. At the time you asked him for his driver's license, did you have the flashlight shining inside the car?

A. No sir.

Q. All right.

When he put his hand in his pocket, did you do anything with the flashlight?

A. Not immediately, I didn't.

[18]

Q. All right.

Was there -- you say not immediately. Did you at some point in time shine the light in the car?

A. Yes, sir, I did.

Q. All right, and why did you do that?

A. His hand was in his pocket too long and it worried me.

Q. Okay. So you shined the light into the car?

A. Yes, sir, I did.

Q. And whereabouts in the car did you shine the light?

A. I shined it directly at his -- where his hand was in his pocket.

Q. And did you see him do anything with his hand?

A. Yes, sir. He pulled his hand partially out of his pocket.

Q. All right, and he pulled his hand partially out of his pocket. Was there anything in his hand?

A. Yes, sir, there was.

Q. And what was in his hand?

A. There were two items. There was a, what I believe a dollar bill that was partially folded and there was a small green balloon stuck between his fingers.

Q. Okay.

A. I'm showing you what's a dollar bill. I'm not going to mark it for evidence because Mr. Carter will probably

[19]

offer it into evidence. Last dollar I've got.

Would you please show the Court the fashion with which the bill was folded?

A. As I -- it was approximately like this (indicating).

Q. All right.

So for the record, it was folded in half one time and then folded again?

A. Again, yes, sir.

Q. So it's folded in quarters?

A. Yes, sir.

Q. It was folded -- how was he holding it in his hand as he pulled it out of his pocket?

A. The dollar, I'm not sure exactly whether it was like this or like this (indicating), but it was between the thumb and the pointer finger in his right hand.

Q. And you said there were two items you saw in his hand. What was the other item you saw in his hand?

A. There was a green plastic balloon that was stuck, I believe, between these two fingers here right like this (indicating).

Q. You say a green plastic balloon. Is that just like an ordinary party balloon that you would blow up at a party?

A. Yes, sir, that's correct.

MR. BANKSTON: Use your own dollar.

BY MR. BANKSTON:

[20]

Q. I believe you said a moment ago, Officer, as of June of 1978 you had been a police officer for approximately -- what? Five and a half years?

A. Yes, sir.

Q. All right, and that you had never

worked narcotics, is that correct?

A. No, sir, I have not.

Q. All right.

Have your ever made any narcotics arrests or been involved in any situations maybe you, yourself, were not the arresting officer, but have you been involved in situations where there were narcotics arrests made.

A. Yes, sir, several times.

Q. All right.

Have you ever been involved in arrests for narcotics where the narcotics was housed or kept in a balloon?

A. Yes, sir, I have.

Q. As a policeman, do you have common knowledge that persons who ---

MR. BUTCHER: Your Honor, we would object to the leading questions.

THE COURT: Sustained to leading.

BY MR. BANKSTON:

Q. All right.

Officer, what is the source of your information?

[21]

You said a moment ago in response to the question I had that you had been involved in some arrests where narcotics were kept in balloons. Do you have any other information, any other source that would cause you to

believe there might be narcotics in the balloon that was pulled out of the pocket of the Defendant?

A. I had made an arrest last year sometime where I had recovered approximately eight or nine such multi-colored balloons.

Q. Have you ever had any conversations with other police officers concerning this factor?

A. Yes, sir.

Q. All right.

The balloon that was in his hand, I didn't understand where in his hand you said it was.

I didn't bring a balloon with me today. Could you show the Court, maybe with this rubber band, kind of where --

A. Okay. It was more or less kind of wedged between the, I say the ring finger and ---

Q. The two middle fingers?

A. Yes, sir.

Q. All right.

Was the balloon itself -- in other words, could you see it from this side of his hand? Was it sticking out through these two fingers here, too (indicating)?

[22]

A. I -- I couldn't see the back of his hand.

Q. Only see the front of his hand?

A. Just the front.

Q. And you could see the balloon as he pulled it out of his pocket, you could see the

balloon in the inside part of his hand; is that correct?

A. Yes, sir, that's correct.

Q. What color did you say that balloon was?

A. It was green.

Q. Now, at the time that he reached into his pocket, was the car door open at all?

A. No, sir, it wasn't.

Q. Was there any inside lights on inside the car? Lights that originate in the car?

A. Not at that particular time, no, sir.

Q. Do you recall whether or not there were any street lights in the area where you set up the driver's check?

A. I believe there was a street light close by.

Q. Okay, but you did have a flashlight; is that ---

A. Yes, sir, I did.

Q. All right.

After he pulled the dollar bill and the balloon out of his pocket, what did you observe him do, if anything, with the balloon or the dollar bill?

A. Well, the hand more or less stayed close to his --

[23]

his front right pocket and I -- I just saw it drop. I saw the green balloon drop to his right leg, side of his leg.

Q. All right.

After that occurred, what was the next event that happened?

A. He reached over to unlock the -- the glove compartment box.

Q. All right.

You said unlock.

A. Well, it's a push-the-button for it to fall.

Q. All right.

To your knowledge, did he -- did it require a key for him to get in the glove box?

A. No, sir.

Q. Did he open the glove box?

A. Yes, sir, he did.

Q. And as he reached into the -- or opened the glove box, was there a light on inside the glove box?

A. Yes, sir, there was.

Q. What did you do with your flashlight, in addition?

A. I followed his hand, right hand, with the flashlight as he -- as he reached over to the car pocket.

Q. All right.

Now, are you still in the same position outside the car that you told the Court you were in a moment ago? You

[24]

said you were facing the driver. If you are the driver of the car and I am you, did you stay in the same position or change your position to see in the glove box, or what?

A. No, sir. I changed my position. I bent down at an angle so I could see what was inside the car pocket.

Q. And could you see what was in the glove box?

A. There was several items. There was quite a few real small plastic vials and there was a lot of powdery, white powdery stuff, seemed like, had spilled out and there was also a bag of just party balloons, I guess.

Q. Based upon your knowledge as a police officer, do plastic vials have any particular meaning or significance to you as a police officer?

A. Yes, sir, they do.

Q. And when -- when you are on your patrol beat and you run across situations where persons have balloons and plastic vials and things of that nature, does it arouse your suspicion?

A. Yes, sir, it does.

Q. And what is the basis of your suspicion, Officer Maples?

A. Just from my prior experience with -- with dealing

[25]

with narcotics.

Q. All right.

Have you ever made any arrests personally or been involved in any sort of situations where arrests were made where narcotics were stored in a plastic vial of the same nature that you saw in the glove box?

A. Personally I haven't seen it in the

plastic vials.

Q. All right.

Have you heard from others' information ---

A. Yes, sir.

Q. All right.

After the Defendant opened the glove box to the car, did he stick his hand inside the glove box?

A. Yes, sir, he more or less rummaged around in it for a minute.

[26]

. . . .

A. I asked the gentleman to step out of the car and to

[27]

go to the back of the car is what I told him.

Q. And did he step out of the car?

A. Yes, sir, he did.

Q. And as he stepped out of the car, did he leave the door open or close the door?

A. No, sir, he shut it directly behind him.

Q. And what did he do then?

A. Okay. He turned to go back to the rear of his car.

Q. And as he did that, did you follow him or what did you do?

A. I shined my light and looked in the seat before and then I followed him.

Q. All right.

As you shined the light into the seat, did you see anything?

A. Yes, sir, I did.

Q. What did you see?

A. I saw a green plastic balloon that was tied at one end still in the seat.

Q. Did you retrieve that balloon at that particular time?

A. To the best of my knowledge I did, yes, sir.

Q. After you retrieved that balloon, what did you do then?

A. Okay. I motioned to Officer Marlow to come back to

[28]

my location where I was.

Q. All right.

Did he come back there?

A. Yes, sir, he did.

Q. And did you have some conversation with Officer Marlow relating to what it was that had just transpired?

A. To the best of my knowledge I showed him what I had and I didn't have to say anything. He realized the situation then.

. . . .

A. Yes. I -- Of course, after I advised Mr. Brown that he was under arrest, I inventoried his car.

Q. All right, and did you inventory the car just you, yourself, or somebody else aid you

[29]

in inventorying the car or what was the

situation?

A. In the -- in the initial inventory, I did all of it.

Q. All right, and did you find anything in the glove box?

A. Yes, sir, I did.

Q. Officer Maples, what did you find?

A. I found a large quantity of small plastic vials and the ---

Q. Were these vials that were empty or vials that had powder in them or what?

A. They were -- I believe they were empty. They were all empty.

Q. All right, and the balloons, were they empty or were they --

A. Yes, sir, they were just regular -- regular balloons. They were still in a package.

Q. Oh. They were still in the package?

A. Yes, sir.

Q. All right.

Did you search any other part of the car?

A. Yes, sir.

Q. What other part of the car did you search?

A. I searched the back floorboard.

Q. Did you find anything back there, sir?

[30]

A. Yes, sir. I found a large bottle. I believe it was 454 gram-size bottle of what I call milk sugar.

Q. Okay, and what else did you find, if anything?

A. I found some, several Baggies of -- or plastic bags containing a green leafy substance.

Q. All right.

Based upon your experience as a police officer, did you have some suspicion as to what that green leafy substance might be?

A. Yes, sir, I did.

MR. CARTER: We're going to object to any opinion that he may have about any green leafy substance.

THE COURT: Overruled.

MR. CARTER: Note our exception.

BY MR. BANKSTON:

Q. Did it look like marijuana?

A. Yes, sir, it did.

[31]

. . . .

Q. The balloon, the green balloon that you saw in the

[33]

possession, first the possession of the Defendant, Clifford James Brown, and later laying on the seat, was that balloon in your open view?

A. Yes, sir, it was.

Q. Did you have to open the door of the car and get inside the car in any way or fashion in order to be able to see the balloon?

A. No. As far as I remember, I didn't, no, sir.

Q. All right.

Well, the first time you saw that balloon, you weren't inside the car, were you?

A. No, sir.

Q. Okay.

(court at ease.)

BY MR. BANKSTON:

Q. Based upon your prior experience as a police officer and based upon the fact that you found this green -- first of all -- scratch that.

Let me ask you this question: Was there any way you could look inside this green balloon when you later recovered it? Were you able to look inside it?

A. Not without tearing it open.

Q. Was there something inside the green balloon?

A. It felt like a powdery substance to me, you know.

Q. Were you able to, you know, shine the flashlight,

[34]

hold the balloon up and shine the flashlight

down there and see it in any way, or did you do that?

A. No, sir.

Q. Okay, but from texture and feeling it, felt like a powdery substance inside the balloon; is that correct?

A. Yes, sir, it did.

Q. And based upon your experience as a police officer, did you believe at the time you recovered that green balloon, did you believe there might be some narcotic inside that balloon?

A. Yes sir, I did.

Q. And did you place the Defendant in this cause, the driver of that car, Clifford James Brown, under arrest?

A. Yes, sir, I did.

Q. And for what charges did you arrest him on?

A. Investigation, illegal possession of controlled substance.

Q. Did you have any idea at the time you made that arrest what kind of controlled substance it was that you were investigating?

A. No, sir.

Q. You're not a chemist, are you?

A. No. sir.

Q. And, of course, the -- the plant substance you saw in the back, did you have reason to believe it was marijuana?

[35]

A. Yes, sir, I did.

Q. Were you also arresting him for possession of the marijuana?

A. Yes, sir, I was. I did.

Q. And was Clifford James Brown transported back to the police station?

A. Yes, sir, he was.

Q. And was he subsequently booked into the Fort Worth Police Department?

A. Yes, sir, that's correct.

Q. In the jail?

A. Yes, sir.

Q. At the time you arrived back at the jail before you talked with anybody, did you have any idea who Clifford James Brown was?

A. No, sir.

Q. Other than just Clifford James Brown?

A. I didn't have any idea who he was.

Q. At that particular time, had you had any conversation with any other police officers concerning the reputation of Clifford James Brown, be it good or be it bad?

A. No, sir, not until after the arrest.

Q. Okay.

MR. BANKSTON: Your Honor, I believe that's all the questions we have.

[36]

. . . .

[CROSS-EXAMINATION OF OFFICER MAPLES]

[MR. CARTER, DEFENSE COUNSEL]:

Q. Could you describe the size of the

balloon for us,

[40]

Officer?

A. It was a tip end of a -- I can't -- well, it was a balloon, probably would be about as large, you know -- not filled with anything -- just my little finger and it was just about that much (indicating) of the tip end of a balloon.

Q. When you say that much, could you give the reporter an estimate of the size and length that you are talking about?

A. Probably mashed down the balloon was maybe probably less than an eighth of an inch, but it was probably half of an inch long, maybe, from the tip to where it's tied.

Q. Is that what you based your arrest of this gentleman on?

A. Yes, sir.

Q. The sight of that balloon?

A. Yes, sir, that's correct.

Q. When you initially saw the balloon, when you looked at it the first time, what did you actually see?

A. I saw a green plastic balloon that was tied at one end.

Q. Were you certain that it was a balloon?

A. Yes, sir.

Q. Okay, and were you certain as to what was in it?

A. No, sir, I was not certain.

Q. All right.

As a matter of fact, when you

prepared the report

[41]

that I have just showed you, your arrest report, you were not certain what was in it?

A. Yes, sir, that's correct.

Q. And as a matter of fact when you first saw the balloon, did it appear to be something along the lines of that right there (indicating)?

A. I don't believe it was quite that full. It was a little larger.

Q. Let's try a smaller one.

A. Well, they look the same size to me.

Q. Let's try something smaller in a different color.

A. To the best of my knowledge, it was a little larger than that. It wasn't quite as full, as far as I remember.

Q. How about that size right there (indicating)?

A. Looks the same to me.

Q. Okay. How about that?

A. Same as the others.

Q. How about that? Okay. Let me lay one more down there. What about that (indicating)?

A. Like I said, as far as I can remember, the other balloon was -- was not quite as filled -- full as those.

[42]

. . . .

Q. Now, you couldn't see through that balloon, could you?

A. No, sir.

Q. You don't know what was in that balloon?

A. No, sir.

Q. To this date, you don't know what was in that balloon, do you?

A. No, sir.

Q. After you arrested him based upon that suspicion that that balloon contained a controlled substance, is that when you searched the car?

A. Yes, sir.

Q. And that's when you went in the glove compartment and then looked under the seat and found the green leafy substance and the bottle of milk sugar, I believe you called it?

[47]

A. Yes, sir.

[48]

. . . .

Q. Okay. Now, the -- you testified you had a flashlight and with that flashlight that you at one time saw part of the contents of the glove compartment; is that correct?

A. Well, I could see in the glove compartment because of the light.

Q. What did you see, Officer?

A. I saw plastic vials and -- and a torn bag of balloons, just regular party balloons.

Q. Just regular old balloons like you would give children?

A. Yes, sir, that's correct.

Q. And the plastic vials were empty, were they not, Officer?

A. Yes, sir.

Q. Okay, and you didn't see any marijuana because you hadn't searched the car yet, had you?

A. No, sir.

Q. As a matter of fact, you didn't know if there was marijuana in the car or not, did you?

[49]

A. No, sir, I had no idea.

Q. And you didn't know if there was a bottle of milk sugar or lactose under the seat, did you?

A. No, sir.

Q. You didn't have any suspicion that there was any lactose under the seat?

A. No, sir.

Q. What did you call it? Milk sugar?

A. That's what I call it, yes, sir.

Q. How -- how did you -- where did you arrive it was milk sugar?

A. From talking to narcotics users. That's what they call it.

. . . .

[50]

REDIRECT EXAMINATION

BY MR. BANKSTON:

Q. Of course, Officer, when you made your arrest at the time you placed the Defendant under arrest, you had had the benefit, had you not, of being able to see in the glove box?

A. Yes, sir.

Q. And you had seen the -- the empty vials there in the glove box, had you not?

A. Yes, sir, that's correct.

Q. And you had seen the -- or the balloons there in the glove box, had you not?

A. Yes, sir, that's correct.

[53]

. . . .

FURTHER REDIRECT EXAMINATION

BY MR. BANKSTON:

Q. Officer, how would you categorize this area of Allen Street in terms of, to your knowledge, based upon your experience as a police officer, is it -- would you say it's a high, medium, or low area of narcotic traffic?

MR. CARTER: Objection, Your Honor, irrelevant to this hearing.

THE COURT: I'll overrule the objection. You may answer the question.

THE WITNESS: I would say in my

opinion it

[55]

would be medium.

[56]

. . . .

FRANK SHILLER,

called on behalf of the Defendant, having been first sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUTCHER [DEFENSE COUNSEL]:

Q. Would you state your name, sir?

A. Frank Shiller.

Q. Mr. Shiller, how are you employed?

A. I'm employed as director of the Crime Laboratory, Fort Worth Police Department.

Q. And how long have you been so employed as director?

A. In that capacity since October of 1972.

Q. And how long have you been an employee of the Crime Lab?

[58]

A. Since 1961.

MR. BUTCHER: Would the State stipulate as to his qualifications?

MR. BANKSTON: State will stipulate he is very qualified.

MR. BUTCHER: Very qualified as a chemist and analyst.

THE COURT: Court will receive the stipulation.

MR. BUTCHER: Thank you.

[59]

. . . .

Q. Mr. Shiller, I'll show you right in front of you is what has been identified as Defendant's Exhibit B and given that these are small balloons and your experience as a chemist -- for how many years, sir?

A. Nineteen years.

Q. Nineteen years as a chemist, and how many years with the lab work -- forensic scientist?

A. Oh, 18 years.

Q. Eighteen years as a forensic scientist?

A. Yes, sir.

Q. And you have analyzed how many -- how many drug analyses have you done? Thousands.

A. I couldn't say. Thousands?

[63]

. . . .

BY MR. BANKSTON [CROSS-EXAMINATION]:

Q. All right.

So, put my question back in perspective, your answer was, "Yes, sir," that there was an analyses done on the contents of

the green balloon?

A. That's correct.

Q. All right, and what was the result of that analysis?

A. Heroin.

. . . .

Q. Mr. Shiller, as a criminalist for the City of Fort Worth Police Department, have you ever had an occasion to examine contents of balloons such as has been exhibited here to you by defense counsel marked as Defendant's Exhibit No. B, I believe? Before, have you -- have you seen anything like these before?

A. Yes, sir, I have.

Q. Is it uncommon or is it very common?

A. It's very common.

[68]

Q. Do you have items of evidence that are submitted to your Crime Lab all the time in containers such as those that are marked for identification purposes as Defense Exhibit No. B.?

A. Yes, sir, I do.

Q. And do you find that it's common or uncommon to discover there is some controlled substance quite frequently housed or contained in balloons such as those?

A. That is a common finding.

[69]

. . . .

[End of Excerpts.]

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUL 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-419

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE STATE OF TEXAS, *Petitioner*

vs.

CLIFFORD JAMES BROWN, *Respondent*

On Writ of Certiorari to the
Court of Criminal Appeals of Texas

Joint Appendix

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PETITION FOR CERTIORARI FILED AUGUST 28, 1981.
CERTIORARI GRANTED JUNE 14, 1982.

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RELEVANT DOCKET ENTRIES

The State of Texas vs. Clifford James Brown
In the 213th District Court, Tarrant County, Texas

07-17-79 Indictment Returned and Capias Ordered. Bond Set at $5,000.

12-11-79 Defendant's 1st motion to suppress.

12-11-79 * * *

Arraignment waived. Waiver of jury filed. Defendant, after being warned, entered plea of Nola [sic] Contendere before the Court. After hearing the evidence, the Court found Defendant guilty and assessed his punishment at -4- years in the Texas Department of Corrections. Defendant not sentenced.

12-28-79 Defendant sentenced to not less than -2- years nor more than -4- years in the Texas Department of Corrections. Defendant to be credited with time spent in jail.

Notice of appeal on Motion to Suppress given in open court.

* * *

Clifford James Brown vs. The State of Texas
In the Court of Criminal Appeals of Texas

3-25-81 Rev. & Rem. — Judge Clinton P3-4-80

7-1-81 Mot. for Leave to File State's Mot. for Reh. Denied. Dissenting Opin. Judge McCormick Joined by Judges Dally & W.C. Davis.

7-3-81 Mandate Issued

11-6-81 Mot. to Stay or Recall Mandate & Stay Proceedings In Trial Court — Denied 11-9-81

[Note: Though not listed on the docket sheet of the Court of Criminal Appeals, the State filed its Motion for Leave to File Motion for Rehearing on April 8, 1981.]

DEFENDANT'S MOTION TO SUPPRESS
AND
INCORPORATED ORDER DENYING MOTION

The State of Texas

vs.

Clifford James Brown

In the 213th District Court
Tarrant County, Texas

DEFENDANT'S FIRST MOTION TO SUPPRESS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CLIFFORD JAMES BROWN, Defendant in the above entitled and numbered cause, by and through his attorneys of record, DON CARTER and ALLAN K. BUTCHER, and files this his First Motion To Suppress all evidence seized by officers of the Fort Worth Police Department in a search of an automobile driven by the Defendant on June 18, 1979 in the City of Fort Worth, Tarrant County, Texas. In support of this motion the Defendant would respectfully show the Court as follows:

1.

On June 18, 1979, a vehicle driven by the Defendant was ordered by officers of the Fort Worth Police Department to stop and he and the vehicle were subjected to a search by said officers.

2.

As a result of this search, officers of the Fort Worth Police Department claim to have seized the following evidence from the person or vehicle driven by the Defendant:

a. A tape-sealed envelope holding a tape-sealed plastic bottle with a balloon containing powder.

b. Tape-sealed envelope holding five tape-sealed plastic bags, each with plant substance.
c. Tape-sealed envelope holding a plastic bottle with powder.
d. Tape-sealed envelope holding a balloon with powder.
e. Tape-sealed envelope holding a tape-sealed box with four plastic bottles, nine plastic caps and powder residue.
f. Tape-sealed bottle of powder and a sack.
g. Torn sack containing balloons and a plastic bag with balloons.
h. A knife, two spoons, bottle opener, two plastic packages of cigarette papers, a key, one dollar bill, one nickel, plastic bottles and caps.

3.

The above described search was unreasonable and illegal in violation of the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution, because it was conducted without a search warrant. This search did not come within any recognized exception to the constitutional requirements of a warrant.

PRAYER

WHEREFORE, the Defendant prays that the Court grant this motion and suppress all evidence seized as a result of the search of the Defendant and the vehicle he was driving on June 18, 1979. The Defendant prays that he be given a hearing on this motion.

Respectfully submitted,

[Signatures of counsel omitted in printing.]

ORDER

BE IT REMEMBERED that the foregoing Defendant's First Motion to Suppress was presented to the Court on the

11 day of December 1979, and it is therefore ordered that the motion is hereby DENIED.

DONE AND ENTERED this 11 day of December 1979.

/s/ TOM CAVE

JUDGE PRESIDING

[Certificate of service omitted in printing.]

TESTIMONY AT THE SUPPRESSION HEARING

In the 213th District Court, Tarrant County, Texas

(Title, caption, and appearances of counsel omitted in printing.)

[Note: State's counsel: Mr. Bankston; Defense counsel: Mr. Carter and Mr. Butcher.]

[3] PROCEEDINGS

[December 11, 1979] [9:30 a.m.]

THE COURT: Mr. Bankston, is the State ready to proceed?

MR. BANKSTON: Yes, Your Honor, State's ready.

THE COURT: All right. Mr. Carter, Mr. Butcher, is the Defendant ready?

MR. CARTER: Defense is ready, Your Honor.

THE COURT: The Court at this time calls Cause No. 17586, entitled The State of Texas versus Clifford James Brown, in which the Indictment alleges the offense of possession of a controlled substance, to-wit: heroin.

The Defendant is present in the Courtroom with his counsel of record.

The matter before the Court at this time is consideration of the Defendant's motion — First Motion to Suppress filed with the clerk of this Court this 11th day of December, 1979, and the Court will hear that matter first.

It is alleged in the Motion to Suppress that the search in question was conducted without a warrant. If this is the case, the burden, of course, is on the State.

[4] Are you ready to proceed?

MR. BANKSTON: Yes, Your Honor, State's ready to proceed.

THE COURT: All right, you may call your first witness.

MR. BANKSTON: State calls Tom Maples.

STATE'S DIRECT EVIDENCE

HAROLD TOM MAPLES,

called as a witness for the State, having been first sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BANKSTON:

Q. State your name, please? A. Harold Tom Maples.

Q. All right. Mr. Maples, how are you currently employed? A. I'm a police officer with the City of Fort Worth.

Q. And how were you employed on June the 18th, 1979, sir? A. As a patrol officer in the police department.

Q. And how long have you been employed in that capacity? A. Little over five and a half years.

[5] Q. All right. Is that of today or is that as of June 18, 1979? A. It would have been five years just a month or so after.

Q. As of today or as of June 18th? A. As of June the 18th.

Q. All right. Officer Maples, back in June of 1979, what duties were you assigned to as a Fort Worth police officer? A. I was dispatched to the 1400 block of East Rosedale to set—help set up a license check.

Q. All right. Perhaps I didn't make my question very clear. Very generally, what division were you assigned to? A. Patrol Division.

Q. All right. Have you ever had any experience as a narcotic officer in your some five and a half to six years as a Fort Worth police officer? A. No, sir.

Q. And your duty hours on June—the month of June, 1979, were what, sir? A. At that time it was from 4:30 in the evening to 2:30 in the morning.

Q. All right. [6] That would be 4:30 p.m. to 2:30 a.m.? A. Yes, sir, that's right.

Q. All right, and were you working with some other patrol officer or were you working alone? A. No, sir, I believe I had a partner that night.

Q. And what was that partner's name? A. His name is David Marlow.

Q. All right.

MR. BUTCHER: Excuse me. I didn't hear that.

David —

BY MR. BANKSTON:

Q. Marlow? A. Marlow.

Q. And for the record, how is that spelled? Do you know, Officer? A. (Spelling) M-a-r-l-o-w, I believe.

Q. Okay. Officer Maples, I would like to call your attention to specifically to June the 18th, 1979, and ask you whether or not you were on duty between the hours of 4:30 p.m. and 2:30 a.m. on June the 18th? A. Yes, sir, I was.

Q. Okay. Sometime the evening of June the 18th, 1979, were you or did you have an occasion to receive a special dispatch or special duties to perform on that evening? A. Yes, sir, I did.

[7] Q. And these — this information or this dispatch came from what person, sir? A. As I remember, I was dispatched by the dispatcher.

Q. Okay, and were you given a location to go to? A. Yes, sir. I believe it was the 1400 block of East Rosedale.

Q. All right. Now, at the time you received the dispatch, was there some other officer with you? A. You talking about in the patrol car with me? Yes, sir.

Q. Yes, sir, and who was that? A. That was Officer Marlow.

Q. And did you indeed go to the location at 1400 East Rosedale? A. Yes, sir, I did.

Q. All right, and when you got there, did you have an occasion either immediately upon arriving or shortly thereafter to see some other police officers? A. Yes, sir, I did.

Q. And who were those police officers that you saw? A. There was a Sergeant Young who was supervising the license check and, of course, Officer Marlow and there was an Officer Gary Johnson and also an Officer Brad Johnson and there was a reserve officer, Buddy Hodges, I believe.

[7A] Q. All right. Let's take these persons one at a time. I believe you have already testified that you, yourself, at that time was a patrol officer; is that right? A. Yes, sir.

Q. All right. A. That's correct.

Q. Officer Marlow—what was his assignment? Was he, too, a patrol officer? A. Yes, sir, that's correct.

Q. And Sergeant Young—is that O. D. Young? A. Yes, sir.

Q. What are his duties? A. He is—at that time was our patrol supervisor.

Q. All right. A. Out in our sector.

Q. Gary Johnson, who was Gary Johnson? A. He was, of course, assigned to the patrol division, also.

Q. And Brad Johnson, who was Brad Johnson? A. He was a patrol officer.

Q. All right, and I believe you said there was a person by the name of Buddy Hodges. Who was Buddy Hodges? A. He's a reserve police officer assigned to patrol.

Q. All right. [8] Now, you mentioned in your answer a while ago that—something about a license check. You said you were dispatched to the 1400 block of East Rosedale. Was the purpose of that dispatch to set up a license check? A. Yes, sir, it was.

Q. And did you go to that location for the purposes of setting up a license check? A. Yes, sir, we did.

Q. And did you, either yourself, set that license check up or participate with other officers in setting up that license check? A. Yes, sir.

Q. All right. Is the 1400 block of East Rosedale, is that a two-lane roadway or four-lane roadway or — or — A. It's a four-lane with—two lanes running either direction.

Q. All right, and runs east and west? A. Yes, sir, it does.

Q. Two lanes running east and two lanes running west? A. Yes, sir.

Q. Would you please describe for the Court how it was that you set up the license check? A. Normally, we would park our units off the street and [9] we would take flares and on the outside lanes on either direction, we would block off and we would funnel the cars into the two inside lanes and put flares in the middle of the street. That's quite a bit safer and we don't have accidents and so forth.

Q. All right. Now, was the particular place on Rosedale that you set this license check up, was it at an intersection or middle of the block or — A. It was in the middle of the block.

Q. All right. Do you recall which direction of traffic you, yourself, were working, making checks? A. I believe it was — I believe it was — I was checking the eastbound traffic.

Q. Okay, and as a matter of course there, Officer, were you stopping every car that would go eastbound on Rosedale or were you making sporadic stops of cars or how were you doing that? A. No. We stopped every car that — that come through.

Q. All right, and the purpose for making these stops, Officer, was for what, sir? A. For checking for traffic violations such as persons that don't carry their driver's license, inspection stickers, license plates that are not registered properly.

[10] Q. What time did you go to the — I don't think I asked you awhile ago. What time did you arrive there approximately at the Rosedale location? A. It was approximately just shortly before 10:00 p.m., I believe.

Q. All right. Had anybody said anything to you specifically about checking for narcotics? A. No, sir.

Q. Was there any narcotics officers out there? A. No, sir.

Q. Did you make any narcotics arrests at the Rosedale location that you were checking driver's licenses? A. No, sir.

Q. Did you have an occasion to stop few cars or many cars in checking the driver's licenses? A. I would say there was quite a few cars.

Q. Did you have an occasion to write any citations or issue any citations to anybody at the Rosedale location for failure to have a driver's license or for some other traffic violation? A. For myself, I don't believe I did.

Q. Do you know whether or not other officers had occasions to write traffic citations of some kind? A. Yes, sir, I believe some of the other officers did.

[11] Q. How long did you stay at the Rosedale location, Officer Maples? A. I would say probably 45 minutes to, maybe, an hour.

Q. All right, and at some point in time did you leave that location and go to another location? A. Yes, sir, we did.

Q. And what time, then, approximately, was it that you went to another location? A. It would have had to have been sometime around 11:00 o'clock p.m., I suppose.

Q. All right, and what location did you go to? A. Okay. We — we transferred to 1200 block of East Allen.

Q. All right. So the Court may — may have a better understanding of what that area is like, is that an intersection or middle of the block? A. No, sir, it's in the middle of the block.

Q. Is it a stretch of road that is straight or is it a curved stretch of road? A. No, sir, it is curved.

Q. It is curved? And did you set your driver's license check up in the 1200 block of East Allen Street in the same fashion that you had done on the Rosedale location or did you do it in [12] some different fashion? A. No, sir, we did it in a different way.

Q. All right, and what way did you do it? A. Really the — of course, we parked our patrol units one behind the other on either side of the road and because of the width of the road we didn't use flares.

Q. Are you saying because of the width of the road — is it a wide street, or is it a narrow street? A. I would say in my opinion it is a narrow street.

Q. Is this a commercial area out there or residential area? A. If it is anything, it's a residential area.

Q. All right. So you didn't use flares in the 1200 block of East Allen Street. What means did you use to flag cars down in order to — to check the driver's license of the drivers? A. We just used our flashlights.

Q. All right. Are they just ordinary flashlights like you would buy at the Handy-Dan or — A. No, sir, it was these expensive Kel-lite type flashlights.

Q. All right. Does it have some sort of red covering on it or — A. No, sir.

[13] Q. — just a plain flashlight? A. Yes, sir.

Q. Did you use any other means to stop cars in that 1200 block of East Allen Street? A. No, sir, not that I can think of.

Q. All right. How about your emergency lights? Did you have any of your emergency lights on your patrol cars on?

A. Yes, sir, some of the cars had the emergency blinkers on, the ones that were closest to the traffic, oncoming traffic, along with maybe blue lights.

Q. All right. Emergency blinkers along with their blue lights? A. Blue lights on top of the patrol car.

Q. Now, the officers that were present at the Rosedale location, did all those officers come over to the 1200 block of East Allen Street? A. Yes, sir, they did.

Q. All right. Were you joined there by anybody in addition to those officers who had been at the Rosedale location? In other words, any other officers come up and join you? A. To my knowledge, I don't believe there were any extra officers.

Q. So on Allen Street, we have the same officers: you, [14] Officer Marlow, Sergeant O. D. Young, Gary Johnson, Brad Johnson, and Buddy Hodges? A. Yes, sir, that's correct.

Q. And all of these are patrol officers; is that correct? A. Except for Sergeant, of course.

Q. And the Sergeant — A. Patrol supervisor.

Q. And the reserve officer, Buddy Hodges? A. Yes, sir.

Q. Now, Officer Maples, your normal assignment is on what — what part of the community? A. It would be the, what I call the deep east side of Fort Worth.

Q. All right. Does that have some sector designation? A. It would be — at that time, I believe it was Sector A-2.

Q. And the area that you were in over on East Allen Street, was that in your sector or was that in a different sector? A. That was in a different sector.

Q. During your years as a police officer, do you occasionally from time to time get special assignments? A. Occasionally, yes, sir.

[15] Q. Do you occasionally get a special assignment that might call for you to work outside your normal area assignment? A. Yes, sir.

Q. Okay. To your knowledge, Officer Maples, has any of these other officers — that would be Marlow, Young, Gary and Brad Johnson, and reserve officer Buddy Hodges — has any of those officers ever worked narcotics detail? A. As far as I know, none of them have.

Q. At the time you would stop these cars as they would come down Allen Street, were you systematically checking for outstanding warrants on the drivers of the cars? A. No, sir.

Q. Did you have time to even do that? A. No, sir.

Q. Officer Maples, I would like to ask you whether or not on June the 18th, 1979, sometime that evening there at 1200 block of East Allen Street, you had an occasion to stop a '70-model Buick 4-door? A. Yes, sir.

Q. Brown Buick? A. Yes, sir, I did.

Q. And was there one or more persons in the car? A. There were one — there was one person in the car.

Q. And did you have a conversation with the person in [16] that car? A. Very brief.

Q. All right, and what did you tell him? A. I — just what I told everybody. Can I see your driver's license.

Q. All right, and at the time you were asking the driver of that car for his driver's license, did you know who he was? A. No, sir.

Q. Had you ever seen him before? A. No, sir.

Q. Did you have any kind of list with you that evening of persons to be on the lookout for, known narcotics users, for example? A. No, sir.

Q. Is the man seated here to the right of Mr. Carter the man who was in that car you stopped? That '70 Buick? A. Yes, sir, it is.

Q. At the time you asked him for his driver's license, was the other officers there with you in the same area as you were? A. They were in the same area, yes, sir.

Q. All right. Were they standing near you at the time that you asked him for his driver's license? Any of the other officers [17] near enough to be able to hear conversation, let's say, had they been listening? A. No, sir.

Q. All right. What was — what was Officer Marlow doing, if you recall? A. As far as I can remember, he was — we were all, you know, stopping cars. He was — had a car stopped, also.

Q. All right. I don't believe I asked you this a moment ago: What side of the — the block were you working in the 1200

block of East Allen? Were you working eastbound traffic or westbound traffic? A. I was on the north — north side of the street, so I would have been working the westbound oncoming traffic.

Q. And was Officer Marlow also working westbound traffic? A. Yes, sir, he was.

Q. All right. When you asked the Defendant for his driver's license, did he say anything to you? A. No, sir, not that I remember.

Q. All right. Did he do anything in response to your — your question for his driver's license? [18] A. Yes, sir, he did.

Q. And what did he do, sir? A. He took his right hand, put it in the front pant's pocket.

Q. Took his right hand and put it in his front pant's pocket? Now, would that be the right pocket or the left pocket? A. It would be his right pocket.

Q. Took his right hand, put it in his right pocket? A. Yes, sir.

Q. All right. At the time he was reaching in his pocket, where were you, sir? A. I was standing directly in front of his — the driver's door facing him.

Q. Did you have your flashlight in your hand? A. Yes, sir, I did.

Q. At the time you asked him for his driver's license, did you have the flashlight shining inside the car? A. No, sir.

Q. All right. When he put his hand in his pocket, did you do anything with the flashlight? A. Not immediately, I didn't. [19] Q. All right. Was there — you say not immediately. Did you at some point in time shine the light in the car? A. Yes, sir, I did.

Q. All right, and why did you do that? A. His hand was in his pocket too long and it worried me.

Q. Okay. So you shined the light into the car? A. Yes, sir, I did.

Q. And whereabouts in the car did you shine the light? A. I shined it directly at his — where his hand was in his pocket.

Q. And did you see him do anything with his hand? A. Yes, sir. He pulled his hand partially out of his pocket.

Q. All right, and he pulled his hand partially out of his pocket. Was there anything in his hand? A. Yes, sir, there was.

Q. And what was in his hand? A. There were two items. There was a, what I believe was a dollar bill that was partially folded and there was a small green balloon stuck between his fingers.

Q. Okay. I'm showing you what's a dollar bill. I'm not going to mark it for evidence because Mr. Carter will probably [20] offer it into evidence. Last dollar I've got. Would you please show the Court the fashion with which the bill was folded? A. As I — it was approximately like this (indicating).

Q. All right. So for the record, it was folded in half one time and then folded again? A. Again, yes, sir.

Q. So it's folded in quarters? A. Yes, sir.

Q. It was folded — how was he holding it in his hand as he pulled it out of his pocket? A. The dollar, I'm not sure exactly whether it was like this or like this (indicating), but it was between the thumb and the pointer finger in his right hand.

Q. And you said there were two items you saw in his hand. What was the other item you saw in his hand? A. There was a green plastic balloon that was stuck, I believe, between these two fingers here right like this (indicating).

Q. You say a green plastic balloon. Is that just like an ordinary party balloon that you would blow up at a party? A. Yes, sir, that's correct.

MR. BANKSTON: Use your own dollar.

BY MR. BANKSTON:

[21] Q. I believe you said a moment ago, Officer, as of June of 1978 you had been a police officer for approximately — what? Five and a half years? A. Yes, sir.

Q. All right, and that you had never worked narcotics, is that correct? A. No, sir, I have not.

Q. All right. Have you ever made any narcotics arrests or been involved in any situations maybe you, yourself, were not the arresting officer, but have you been involved in situations where there were narcotics arrests made? A. Yes, sir, several times.

Q. All right. Have you ever been involved in arrests for narcotics where the narcotics was housed or kept in a balloon? A. Yes, sir, I have.

Q. As a policeman, do you have common knowledge that persons who—

MR. BUTCHER: Your Honor, we would object to the leading questions.

THE COURT: Sustained to leading.

BY MR. BANKSTON:

Q. All right. Officer, what is the source of your information? [22] You said a moment ago in response to the question I had that you had been involved in some arrests where narcotics were kept in balloons. Do you have any other information, any other source that would cause you to believe there might be narcotics in the balloon that was pulled out of the pocket of the Defendant? A. I had made an arrest last year sometime where I had recovered approximately eight or nine such multi-colored balloons.

Q. Have you ever had any conversations with other police officers concerning this factor? A. Yes, sir.

Q. All right. The balloon that was in his hand, I didn't understand where in his hand you said it was. I didn't bring a balloon with me today. Could you show the Court, maybe with this rubber band, kind of where—A. Okay. It was more or less kind of wedged between the, I say the ring finger and—

Q. The two middle fingers? A. Yes, sir.

Q. All right. Was the balloon itself—in other words, could you see it from this side of his hand? Was it sticking out through these two fingers here, too (indicating)? [23] A. I—I couldn't see the back of his hand.

Q. Only see the front of his hand? A. Just the front.

Q. And you could see the balloon as he pulled it out of his pocket, you could see the balloon in the inside part of his hand; is that correct? A. Yes, sir, that's correct.

Q. What color did you say that balloon was? A. It was green.

Q. Now, at the time that he reached into his pocket, was the car door open at all? A. No, sir, it wasn't.

Q. Was there any inside lights on inside the car? Lights that originate in the car? A. Not at that particular time, no, sir.

Q. Do you recall whether or not there were any street lights in the area where you set up the driver's check? A. I believe there was a street light close by.

Q. Okay, but you did have a flashlight; is that—A. Yes, sir, I did.

Q. All right. After he pulled the dollar bill and the balloon out of his pocket, what did you observe him do, if anything, with the balloon or the dollar bill? A. Well, the hand more or less stayed close to his— [24] his front right pocket and I—I just saw it drop. I saw the green balloon drop to his right leg, side of his leg.

Q. All right. After that occurred, what was the next event that happened? A. He reached over to unlock the—the glove compartment box.

Q. All right. You said unlock. A. Well, it's a push-the-button for it to fall.

Q. All right. To your knowledge, did he—did it require a key for him to get in the glove box? A. No, sir.

Q. Did he open the glove box? A. Yes, sir, he did.

Q. And as he reached into the—or opened the glove box, was there a light on inside the glove box? A. Yes, sir, there was.

Q. What did you do with your flashlight, in addition? A. I followed his hand, right hand, with the flashlight as he—as he reached over to the car pocket.

Q. All right. Now, are you still in the same position outside the car that you told the Court you were in a moment ago? You [25] said you were facing the driver. If you are the driver of the car and I am you, did you stay in the same position or change your position to see in the glove box, or what? A. No, sir. I changed my position. I bent down at an angle so I could see what was inside the car pocket.

Q. And could you see what was in the glove box? A. Yes, sir, I could.

Q. Would you please tell the Court what it was inside the glove box? A. There was several items. There was quite a few real small plastic vials and there was a lot of powdery, white powdery stuff, seemed like, had spilled out and there was also a bag of just party balloons, I guess.

Q. Based upon your knowledge as a police officer, do plastic vials have any particular meaning or significance to you as a police officer? A. Yes, sir, they do.

Q. And when — when you are on your patrol beat and you run across situations where persons have balloons and plastic vials and things of that nature, does it arouse your suspicion? A. Yes, sir, it does.

Q. And what is the basis of your suspicion, Officer Maples? A. Just from my prior experience with — with dealing [26] with narcotics.

Q. All right. Have you ever made any arrests personally or been involved in any sort of situations where arrests were made where narcotics were stored in a plastic vial of the same nature that you saw in the glove box? A. Personally I haven't seen it in the plastic vials.

Q. All right. Have you heard from others' information — A. Yes, sir.

Q. All right. After the Defendant opened the glove box to the car, did he stick his hand inside the glove box? A. Yes, sir, he more or less rummaged around in it for a minute.

Q. All right. Did he find a driver's license? A. No, sir.

MR. CARTER: Objection, Your Honor. He's just continually leading the witness. We would prefer he asked him questions, let him testify.

THE COURT: As to the last question, I'll overrule the objection.

BY MR. BANKSTON:

Q. Did he find a driver's license? [27] A. No, sir, he did not.

Q. Now, is it uncommon for you as a police officer to stop cars where driver's licenses are kept in the glove box?

MR. CARTER: Objection, Your Honor, that's leading again.

THE COURT: Overruled.

MR. CARTER: Note our exception.
THE COURT: Yes, sir.
MR. BANKSTON: No jury.
THE WITNESS: I'm sorry. What was your question.
BY MR. BANKSTON:

Q. In my question was — was it uncommon for you as a patrol officer to encounter situations where persons keep their driver's license in the glove box? A. No, sir, it's not uncommon.

Q. All right. After he rummaged around in the glove box a moment, what happened after that? A. He just made the statement that I don't have a driver's license.

Q. Did you say anything in response to that statement? A. Yes, sir, I did.

Q. What did you say? A. I asked the gentleman to step out of the car and to [28] go to the back of the car is what I told him.

Q. And did he step out of the car? A. Yes, sir, he did.

Q. And as he stepped out of the car, did he leave the door open or close the door? A. No, sir, he shut it directly behind him.

Q. And what did he do then? A. Okay. He turned to go back to the rear of his car.

Q. And as he did that, did you follow him or what did you do? A. I shined my light and looked in the seat before and then I followed him.

Q. All right. As you shined the light into the seat, did you see anything? A. Yes, sir, I did.

Q. What did you see? A. I saw a green plastic balloon that was tied at one end still in the seat.

Q. Did you retrieve that balloon at that particular time? A. To the best of my knowledge, I did, yes, sir.

Q. After you retrieved that balloon, what did you do then? A. Okay. I motioned to Officer Marlow to come back to [29] my location where I was.

Q. All right. Did he come back there? A. Yes, sir, he did.

Q. And did you have some conversation with Officer Marlow relating to what it was that had just transpired? A. To the

best of my knowledge I showed him what I had and I didn't have to say anything. He realized the situation then.

Q. All right, and after you got Officer Marlow back there, what did you do, sir? A. We asked him for—if he had any type of identification at all.

Q. All right, and did he respond to that? A. Yes, sir. I believe he gave Officer Marlow a—his name and—and particular date of birth.

Q. All right, and did he give him the name Clifford James Brown? A. Yes, sir.

Q. All right. After you got his name, did you do anything else in regard to the investigation of this case? A. Yes. I—Of course, after I advised Mr. Brown that he was under arrest, I inventoried his car.

Q. All right, and did you inventory the car just you, [30] yourself, or somebody else aid you in inventorying the car or what was the situation? A. In the—in the initial inventory, I did all of it.

Q. All right, and did you find anything in the glove box? A. Yes, sir, I did.

Q. Officer Maples, what did you find? A. I found a large quantity of small plastic vials and the—

Q. Were these vials vials that were empty or vials that had powder in them or what? A. They were—I believe they were empty. They were all empty.

Q. All right, and the balloons, were they empty or were they—A. Yes, sir, they were just regular—regular balloons. They were still in a package.

Q. Oh. They were still in the package? A. Yes, sir.

Q. All right. Did you search any other part of the car? A. Yes, sir.

Q. What other part of the car did you search? A. I searched the back floorboard.

Q. Did you find anything back there, sir? [31] A. Yes, sir. I found a large bottle. I believe it was 454 gram-size bottle of what I call milk sugar.

Q. Okay, and what else did you find, if anything? A. I found some, several Baggies of—or plastic bags containing a green leafy substance.

Q. All right. Based upon your experience as a police officer, did you have some suspicion as to what that green leafy substance might be? A. Yes, sir, I did.

MR. CARTER: We're going to object to any opinion that he may have about any green leafy substance.

THE COURT: Overruled.

MR. CARTER: Note our exception.

BY MR. BANKSTON:

Q. Did it look like marijuana? A. Yes, sir, it did.

Q. All right. Did you find any kind of narcotic paraphernalia any place in the car? A. Yes, sir, I—to the best of my knowledge I did.

Q. Okay. All right. Now, these items that you found in the car, Officer, did you take custody of those items yourself? [32] A. Yes, sir, I did.

Q. And what did you do with them? A. Well, I—I put them in—as I gathered the evidence up, I put it in a sack or some sort of thing and I took it to the police department.

Q. All right, and at some subsequent point in time was that evidence turned over to the Crime Lab or a locked box leading to the Crime Lab? A. It was turned over to a locker, yes.

Q. Officer Maples, did you subsequently have an occasion either there while on location on Allen Street to write a traffic citation to the Defendant, or either back at the police station did you have an occasion to write a traffic ticket? A. Yes, sir, I did.

Q. And what was that trick—ticket for? A. That was for no operator's license.

Q. All right. Now, at the time you stopped these (sic) '70 brown Buick with this—with the Defendant in it, how long had you been on location there at 1200 block of East Allen Street? A. Approximately 15 minutes.

Q. All right. Prior to the time that you stopped him, had you stopped other automobiles? [33] A. Yes, sir, I had.

Q. Could you estimate for the Court how many automobiles you had stopped up until the time you encountered the Defendant? A. It was pretty—fairly busy for that street that night. It would be hard to say, but it was quite a few cars.

Q. All right. Did you have an occasion to issue any citations prior to the time that you encountered the Defendant in this case on June 18th? A. If I did, I don't remember.

Q. All right. Were there citations issued by other persons out there in your presence? A. Yes, sir, there was.

Q. And did you make any narcotics arrests other than this one on June the 18th, 1979, either at the Rosedale location, the first location that you set up, or at the Allen Street location? A. No, sir.

Q. Did any other policeman, to your knowledge or in your presence, make any narcotics arrests at either of those locations? A. No, sir.

Q. The balloon, the green balloon that you saw in the [34] possession, first the possession of the Defendant, Clifford James Brown, and later laying on the seat, was that balloon in your open view? A. Yes, sir, it was.

Q. Did you have to open the door of the car and get inside the car in any way or fashion in order to be able to see the balloon? A. No. As far as I remember, I didn't, no, sir.

Q. All right. Well, the first time you saw that balloon, you weren't inside the car, were you? A. No, sir.

Q. Okay.

(court at ease.)

BY MR. BANKSTON:

Q. Based upon your prior experience as a police officer and based upon the fact that you found this green—first of all—scratch that. Let me ask you this question: Was there any way you could look inside this green balloon when you later recovered it? Were you able to look inside it? A. Not without tearing it open.

Q. Was there something inside the green balloon? A. It felt like a powdery substance to me, you know.

Q. Were you able to, you know, shine the flashlight, [35] hold the balloon up and shine the flashlight down there and see it in any way, or did you do that? A. No, sir.

Q. Okay, but from texture and feeling it, felt like a powdery substance inside the balloon; is that correct? A. Yes, sir, it did.

Q. And based upon your experience as a police officer, did you believe at the time you recovered that green balloon, did you believe there might be some narcotic inside that balloon? A. Yes, sir, I did.

Q. And did you place the Defendant in this cause, the driver of that car, Clifford James Brown, under arrest? A. Yes, sir, I did.

Q. And for what charges did you arrest him on? A. Investigation, illegal possession of controlled substance.

Q. Did you have any idea at the time you made that arrest what kind of controlled substance it was that you were investigating? A. No, sir.

Q. You're not a chemist, are you? A. No, sir.

Q. And, of course, the—the plant substance you saw in the back, did you have reason to believe it was marijuana? [36] A. Yes, sir, I did.

Q. Were you also arresting him for possession of the marijuana? A. Yes, sir, I was. I did.

Q. And was Clifford James Brown transported back to the police station? A. Yes, sir, he was.

Q. And was he subsequently booked into the Fort Worth Police Department? A. Yes, sir, that's correct.

Q. In the jail? A. Yes, sir.

Q. At the time you arrived back at the jail before you talked with anybody, did you have any idea who Clifford James Brown was? A. No, sir.

Q. Other than just Clifford James Brown? A. I didn't have any idea who he was.

Q. At that particular time, had you had any conversation with any other police officers concerning the reputation of Clifford James Brown, be it good or be it bad? A. No, sir, not until after the arrest.

Q. Okay.

MR. BANKSTON: Your Honor, I believe that's all the questions we have.

[37] THE COURT: Gentlemen, we will recess at this time for ten minutes. We will continue at 10:20.

MR. CARTER: Could we ask for the police report of Mr. Maples right now, rather than after Mr. Maples gets back out here?

THE COURT: Do you have it available, Mr. Bankston?

MR. BANKSTON: I don't have but one copy, Your Honor. I'll be happy to let them use my copy and get them one later if—

MR. CARTER: That will be fine.

[Court in recess at 10:12 a.m.]

[At 10:30 a.m., the following proceedings are had before the Court.]

THE COURT: Gentlemen, the Court's been in recess for about 20 minutes, during which time it's the understanding of the Court counsel for the Defendant has had an opportunity to examine the offense report in this case. The Court is advised by counsel for the State that he wishes to ask one additional question at this time. Court will allow that.

MR. BANKSTON: All right. Thank you, Your Honor.

[38] BY MR. BANKSTON:

Q. Officer Maples, you are the same Officer Maples, are you not, who was testifying prior to the recess? A. Yes, sir, I am.

Q. All right. Officer Maples, let me ask you whether or not on June the 18th, 1979, at the time you stopped the Defendant's automobile and after the time that you had an occasion to observe the green balloon in his possession, did you, sir, have a—have time to go down to the Municipal Courts or to obtain a search warrant of some kind? A. No, sir, I did not.

Q. How far would that have been away from where you were? A. It probably would have been a 15-minute drive just from where we were.

MR. BANKSTON: I believe that's all the questions we have, Judge.

THE COURT: You may cross-examine, gentlemen.

MR. CARTER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. CARTER:

Q. Officer, my name is Don Carter. A. Yes, sir.

Q. If I ask you a question you don't hear or don't [39] understand, talk too fast—which I sometimes do—if you will stop me, I will repeat it. A. Yes, sir.

Q. You just testified, Officer, that you arrested Clifford James Brown on June 18th, 1979, and that you read him his rights and you had him under arrest prior to the search of his automobile; is that correct? A. Yes, sir, that's correct.

Q. At that time, when you had him under arrest, when you say arrest, you mean to take a person to the police station, do you not? A. Yes, sir, that's correct.

Q. And at that time you could have or would have and did impound his automobile at the scene? A. Yes, sir, we did impound the vehicle.

Q. So the car could have been searched subsequent to that arrest because you were going to take him to the police station, were you not? He was under arrest? A. Yes, sir, that's correct.

Q. You were going to take him to the police station? A. Yes, sir.

Q. His car was to be impounded and could have been searched anytime after that, done an inventory, search, or whatever? A. Yes, sir.

[40] Q. Okay. Officer, I reviewed your offense report, arrest report as you call it, that you prepared.

[Defendant's Exhibit A, an arrest report, is marked for identification.]

BY MR. CARTER:

Q. Marked this Defendant's Exhibit 1, show it to you. It's several pages. Ask you to examine it and ask you if that's a

copy of the arrest report that you prepared personally after the arrest of Clifford James Brown? A. Yes, sir, it is.

Q. All right, and in that report—you can look at it. In that report, Officer, did you write down the facts of the arrest? A. Yes, sir, I did.

Q. All right, and is there anywhere in that report, Officer, where you state what type of controlled substance that you suspected Clifford James Brown of possessing on that day? A. No, sir.

Q. Now, basically, as a matter of fact, your arrest of Clifford James Brown was based on your suspicion that he did have a controlled substance in that balloon; is that correct? A. Yes, sir, that is.

Q. Could you describe the size of the balloon for us, [41] Officer? A. It was a tip end of a—I can't—well, it was a balloon, probably would be about as large, you know—not filled with anything—just my little finger and it was just about that much (indicating) of the tip end of a balloon.

Q. When you say that much, could you give the reporter an estimate of the size and length that you are talking about? A. Probably mashed down the balloon was maybe probably less than an eighth of an inch, but it was probably half of an inch long, maybe, from the tip to where it's tied.

Q. Is that what you based your arrest of this gentleman on? A. Yes, sir.

Q. The sight of that balloon? A. Yes, sir, that's correct.

Q. When you initially saw the balloon, when you looked at it the first time, what did you actually see? A. I saw a green plastic balloon that was tied at one end.

Q. Were you certain that it was a balloon? A. Yes, sir.

Q. Okay, and were you certain as to what was in it? A. No, sir, I was not certain.

Q. All right. As a matter of fact, when you prepared the report [42] that I have just showed you, your arrest report, you were not certain what was in it? A. Yes, sir, that's correct.

Q. You couldn't tell anyone at that time without it being analyzed by the Crime Lab as to, with any degree of certainty, what was in the balloon itself? A. Yes, sir, that's correct.

Q. And as a matter of fact when you first saw the balloon, did it appear to be something along the lines of that right there (indicating)? A. I don't believe it was quite that full. It was a little larger.

Q. Let's try a smaller one. A. Well, they look the same size to me.

Q. Let's try something smaller in a different color. A. To the best of my knowledge, it was a little larger than that. It wasn't quite as full, as far as I remember.

Q. How about that size right there (indicating)? A. Looks the same to me.

Q. Okay. How about that? A. Same as the others.

Q. How about that? Okay. Let me lay one more down there. What about that (indicating)? A. Like I said, as far as I can remember, the other balloon was — was not quite as filled — full as those.

[43] Q. I have laid down there — correct me if I'm wrong — but seven different colored, multi-colored types of balloons that look like they've got a knot in them; is that correct? A. Yes, sir.

Q. All right, and you're looking at them? A. Yes, sir.

Q. Can you tell me what is in any of those balloons? A. No, sir, I cannot.

Q. Can you tell me, as a matter of fact, whether there is a powdery substance, without feeling them? Just looking at them, can you tell me if there is a powdery substance in there or if it's rubber in there or gold or — A. Not without touching them.

Q. So without touching these, all they appear to be is just green, orange, blue, red, yellow, pink balloons? A. Yes, sir, that's correct.

Q. And they could be solid rubber just from looking at them; is that correct? A. Yes, sir.

Q. Okay. Do they appear to be the type of balloon that you are talking about you saw the night, June 18, 1979, when you

arrested Clifford James Brown? A. They appear to be, yes, sir.

Q. Same type? A. Yes, sir.

[44] MR. CARTER: I'll hand these to the reporter and ask her to mark them as a group as Defendant's Exhibit 2.

[Defendant's Exhibit B, seven balloons, is marked as a group for identification.]

BY MR. CARTER:

Q. Officer, these—these balloons that have been marked as Defendant's Exhibit B, you have stated they appear to—just like the balloon or whatever you saw the night that you arrested Clifford James Brown?

MR. BANKSTON: Your Honor, that's not what he said at all. As a matter of fact, he said they appeared to be a little bit larger.

THE COURT: Overrule the objection.

You may answer the question.

BY MR. CARTER:

Q. Is that true? They appear to be the same type of balloon? A. Yes, sir, they appear to be.

Q. Size could be a little bit off? A. Yes, sir, that's correct.

Q. It could be a solid balloon just wadded up inside one end, could it not, sir? [45] A. Just looking at them, yes, sir.

Q. The night you arrested Clifford James Brown, you arrested him after you saw the balloon between his fingers and —and later dropped to the seat, did you not? A. Yes, sir, after I picked the balloon up.

Q. Well, I'm talking about when you got him out of the car and took him to the back of the car. A. Okay. I've lost you somewhere.

Q. All right. Let's start over. You say you saw these—this balloon between his fingers? A. Yes, sir.

Q. You saw him drop it and at that time you told him to get out of the car? A. Yes, sir.

Q. And you took him to the back of the car and read him his rights? A. Yes, sir.

Q. And told him he was under arrest? A. Yes, sir, that's correct.

Q. And then at that time, you left him and went to the car and searched the car; is that not true? A. Are you speaking about the balloon now?

MR. BANKSTON: Your Honor, that's not what he said, either. I believe he said a moment ago—

[46] MR. CARTER: Well, now, Judge, is he testifying or—

THE COURT: Overruled.

MR. CARTER:—is he going to let me ask questions?

THE COURT: Overruled. You may proceed.

BY MR. CARTER:

Q. You said you took him to the back of the car, you read him his rights and arrested him. A. Yes, sir.

Q. Then you went back to search the car. A. Yes, sir.

Q. At that time you picked up the balloon that you saw, the green balloon? A. No, sir. I had picked it up before he went to the back of the car.

Q. When had you picked it up? A. After he shut the door.

Q. After he had shut the door to his automobile? A. Yes, sir.

Q. Then you opened the door? A. No, sir, I did not.

Q. How did you get the balloon? A. I looked in the seat with my flashlight and I reached in.

[47] Q. You reached in and got the balloon and picked it up? A. Yes, sir, that's correct.

Q. And then you took him to the back of the car, read him his rights and arrested him? A. Yes, sir.

Q. Then the arrest of Clifford James Brown that night was based upon your suspicion that that balloon contained a controlled substance; is that correct? A. Yes, sir, that's correct.

Q. Now, you couldn't see through that balloon, could you? A. No, sir.

Q. You don't know what was in that balloon? A. No, sir.

Q. To this date, you don't know what was in that balloon, do you? A. No, sir.

Q. After you arrested him based upon that suspicion that that balloon contained a controlled substance, is that when you searched the car? A. Yes, sir.

Q. And that's when you went in the glove compartment and then looked under the seat and found the green leafy substance and the bottle of milk sugar, I believe you called it? [48] A. Yes, sir.

Q. Did — when did you first pat him down for a weapon? A. Well, after we put him under arrest we, you know, do that just a matter of routine.

Q. Did you do it? A. Yes, sir.

Q. When did you do that? A. Well, after I advised him he was under arrest.

Q. You arrested him, patted him down at the back of the car? A. Yes, sir, best of my knowledge.

Q. All right, and was he in the custody of an officer? A. Well, there were two of us there, yes, sir.

Q. Was he in the custody of an officer and under arrest? A. I would say so.

Q. Who would that officer be? A. It would have been myself and Officer Marlow.

Q. And who searched the car? A. I did all the searching.

Q. Was the Defendant inside the car at the time you searched the car? A. No, sir, he was not.

Q. He was at the rear of the automobile? A. Yes, sir.

Q. And he couldn't have reached in the car and gotten [49] anything? A. No, sir.

Q. Okay. You didn't feel like that you were in any peril from him reaching in the glove compartment at the time he was at the back of the car under arrest, did you? A. No, sir.

Q. Okay. Now, the — you testified you had a flashlight and with that flashlight that you at one time saw part of the contents of the glove compartment; is that correct? A. Well, I could see in the glove compartment because of the light.

Q. What did you see, Officer? A. I saw plastic vials and — and a torn bag of balloons, just regular party balloons.

Q. Just regular old balloons like you would give children? A. Yes, sir, that's correct.

Q. And the plastic vials were empty, were they not, Officer? A. Yes, sir.

Q. Okay, and you didn't see any marijuana because you hadn't searched the car yet, had you? A. No, sir.

Q. As a matter of fact, you didn't know if there was marijuana in the car or not, did you? [50] A. No, sir, I had no idea.

Q. And you didn't know if there was a bottle of milk sugar or lactose under the seat, did you? A. No, sir.

Q. You didn't have any suspicion that there was any lactose under the seat? A. No, sir.

Q. What did you call it? Milk sugar? A. That's what I called it, yes, sir.

Q. How — how did you — where did you arrive it was milk sugar? A. From talking to narcotics users. That's what they call it.

Q. You didn't taste it that night? A. Oh, no, sir. No, sir.

Q. You didn't open the balloon to see what was in it? You didn't taste what was in it? A. No, sir.

Q. Did you smell it and from the smell were you able to tell it was a narcotic? A. No, sir.

Q. Or controlled substance? A. No, sir.

Q. When you felt it, what did it feel like? A. It just — just felt like a powder of some sort to [51] me.

Q. Would you take the seven balloons that I have there in Defendant's Exhibit B and feel of those? A. (Witness complies.)

Q. Have you felt of them? A. Yes, sir, I did.

Q. Do they feel anything like what you felt that night? A. Similar, yes, sir.

Q. Similar? Can you tell me what is in any of those seven balloons just by looking at them and feeling of them? A. No, sir, I cannot.

Q. Would it be fair to say that it would be impossible with any degree of certainty to tell what was in that green balloon that you took from Clifford James Brown that night on June the 18th, 1979? Wouldn't it be impossible to say what was in it with any degree of certainty? A. Yes, sir, that's correct.

Q. So he was arrested on the suspicion that the green balloon that you found contained a controlled substance, some type of controlled substance? A. Yes, sir.

Q. It could have been cocaine, heroin, it could have been face powder, it could have been a solid balloon, it could have been anything when you first saw it; right? [52] A. Yes, sir.

Q. Any type of powder? A. Yes, sir.

Q. It could have had water in it? A. No, sir.

Q. Before you — I'm talking about before you felt of it? A. Oh, yes, sir.

Q. Could have had anything in it? A. Yes, sir.

Q. You can't tell me what's in those balloons that are in Defendant's Exhibit B? A. No, sir.

Q. It's not uncommon — did you testify that it was not uncommon for people to keep their licenses in their glove compartment? A. No, sir. It seems like everybody does.

Q. The — the arrest, then, basically, — what you're talking about is this green balloon was in your plain sight? A. Yes, sir.

Q. And based upon your suspicion that it contained a controlled substance, that is what you based your arrest on? A. Yes, sir.

Q. And that's why he was arrested? A. Yes, sir, that's correct.

[53] Q. Okay. He wasn't arrested because of anything you couldn't see under the seat? A. No, sir, I hadn't seen them yet.

MR. CARTER: I believe that's all we have, Your Honor.

MR. BANKSTON: I have a few more questions, Your Honor.

THE COURT: Mr. Bankston.

REDIRECT EXAMINATION

BY MR. BANKSTON:

Q. Of course, Officer, when you made your arrest at the time you placed the Defendant under arrest, you had had the benefit, had you not, of being able to see in the glove box? A. Yes, sir.

Q. And you had seen the — the empty vials there in the glove box, had you not? A. Yes, sir, that's correct.

Q. And you had seen the — or the balloons there in the glove box, had you not? A. Yes, sir, that's correct.

Q. Are you required to, as a matter of procedure, when a car is being pulled, to fill out some kind of document or some sort of paper as a matter of procedure there with the police department? A. Yes, sir, we are.

[54] Q. Do you, yourself, fill out one of those — first of all, what is it called? A. Wrecker slip.

Q. Wrecker slip? All right. Was a wrecker called to tow this car in? A. Yes, sir.

Q. And did somebody, either you or Officer Marlow, fill out a wrecker slip? A. Yes, sir, Officer Marlow did.

Q. What kind of information is on this wrecker slip? A. If there is anything valuable — money or whatever — anything that would be of value that could be lost or so forth would need to be put on this wrecker slip.

Q. In other words, it's an inventory? A. Yes, sir.

Q. And is that what you were — one of the things you were doing out there on 1200 block of Allen Street at the time you were making that arrest was taking an inventory of an automobile in order to fill out the information on a wrecker slip? A. Yes, sir, that's correct.

Q. And, of course, the items that you found that were of suspicious nature, evidentiary items, did you leave those items in the car itself or did you take those items? A. No, sir, we tagged those as evidence.

[55] MR. BANKSTON: Pass the witness.

RECROSS-EXAMINATION

BY MR. CARTER:

Q. Mr. Bankston had drawn your attention back to the glove compartment box and that you had had the added benefit of shining your light in that glove compartment box when you made the arrest and the benefit that you derived from that was to see empty vial bottles; is that correct? A. Yes, sir.

Q. And to see empty balloons, party balloons; is that it? A. Yes, sir.

MR. CARTER: No further questions.

THE COURT: Anything further, Mr. Bankston?

FURTHER REDIRECT EXAMINATION

BY MR. BANKSTON:

Q. Officer, how would you categorize this area of Allen Street in terms of, to your knowledge, based upon your experience as a police officer, is it — would you say it's a high, medium, or low area of narcotic traffic?

MR. CARTER: Objection, Your Honor, irrelevant to this hearing.

THE COURT: I'll overrule the objection.

You may answer the question.

THE WITNESS: I would say in my opinion it [56] would be medium.

BY MR. BANKSTON:

Q. Okay. Certainly not as high as the Evans-Rosedale area; is that correct? A. Pardon me?

Q. I said, certainly wouldn't be as high —

MR. BUTCHER: Your Honor, we object to the leading questions —

[Exchanges inaudible.]

THE WITNESS: No, sir.

THE COURT: Mr. Butcher, for purposes of the record, your objection is overruled.

BY MR. BANKSTON:

Q. And were you — and were you aware of that on June the 18th of 1979? The reputation or lack thereof of this area, 1200 block of East Allen Street? A. Yes, sir, I was.

Q. Okay.

MR. BANKSTON: I pass the witness.

MR. CARTER: No further questions, Your Honor.

THE COURT: You may step down.

MR. CARTER: We would like for him to stay available, Your Honor.

THE COURT: All right, sir. Would you remain in the area of the witness room?

[57] THE WITNESS: Yes, Your Honor.

[Witness excused from the Courtroom.]

THE COURT: Has the State further evidence to present at this time?

MR. BANKSTON: No, Your Honor. At this time the State rests.

THE COURT: Mr. Carter, Mr. Butcher, the State has rested. Do you wish to present any evidence?

MR. CARTER: I believe we do have one witness, Your Honor.

THE COURT: All right, you may call your witness.

MR. BUTCHER: Call Frank Shiller.

MR. BANKSTON: Your Honor, before Mr. Shiller testifies, I would like some representation from the defense that this is something other than a — an attempt to get into the — the analytical procedures in the business there of the Crime Lab. This is strictly a hearing to determine probable cause, and Mr. Shiller, I expect the evidence is going to show, wasn't there on June the 18th, 1979, and would have no knowledge at all concerning any evidence of probable cause. Like some representation that they are not getting intc the questions of [58] the procedures used to determine whether or not this is heroin.

THE COURT: Do you wish to respond, Mr. Butcher?

MR. BUTCHER: It's not our — we don't anticipate going into the mechanics of the analysis.

THE COURT: Let's proceed, then. Mr. Shiller, please.

DEFENDANT'S DIRECT EVIDENCE

[Witness sworn.]

FRANK SHILLER,

called on behalf of the defendant, having been first sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Would you state your name, sir? A. Frank Shiller.

Q. Mr. Shiller, how are you employed? A. I'm employed as director of the Crime Laboratory, Fort Worth Police Department.

Q. And how long have you been so employed as director? A. In that capacity since October of 1972.

Q. And how long have you been an employee of the Crime Lab? [59] A. Since 1961.

MR. BUTCHER: Would the State stipulate as to his qualifications?

MR. BANKSTON: State will stipulate he is very qualified.

MR. BUTCHER: Very qualified as a chemist and analyst.

THE COURT: Court will receive the stipulation.

MR. BUTCHER: Thank you.

BY MR. BUTCHER:

Q. Mr. Shiller, you are here as a result of a subpoena; is that correct? A. Yes, sir.

Q. And do you have with you the information regarding the evidence seized from Clifford James Brown on or about June the 18th, 1979? A. Yes, I have.

Q. And do you have a physical evidence examination form? A. Yes, sir.

Q. Would you take that out, please? A. (Witness complies.)

[Defendant's Exhibit C, a physical evidence form, is marked for identification.]

[60] BY MR. BUTCHER:

Q. Mr. Shiller, I hand you what's been marked for identification purposes as Defendant's Exhibit C. Do you recognize that? A. Yes, sir, I do.

Q. And what is that? A. Defendant's Exhibit C is the lab report No. 50406 on Clifford James Brown.

Q. And does this list the evidence that was taken from the evidence locker relating to the arrest of Clifford James Brown on June the 18th, 1979? A. It does.

Q. And the items are listed there. Would you read what was contained in the staple-sealed sack?

MR. BANKSTON: Your Honor, we're going to object to any reading or recitation from the exhibit. Number one is it's no showing that this is the report of Mr. Shiller. As a matter of fact, to the contrary. The document, State's Exhibit — or Defendant's Exhibit C, indicates is the report of somebody else. If I had some idea of what it is they are seeking to establish, maybe I would stipulate to it, we would save all this, but Mr. Shiller is going to be testifying, number one, as to hearsay as to what somebody else has reported.

[61] THE COURT: Court will overrule that objection at this time.

BY MR. BUTCHER:

Q. Will you read, sir, the items that were in the staple-sealed sack? A. All right.

Q. Starting with "A." A. Item A, a tape-sealed envelope holding a tape-sealed plastic bottle with a balloon containing powder. Item B, tape-sealed envelope holding five tape-sealed plastic bags, each with plant substance. Item C, tape-sealed envelope holding a plastic bottle with powder. Item D, tape-sealed envelope holding a balloon with powder. Item E, tape-sealed envelope holding a tape-sealed box with four plastic bottles, nine plastic caps, and powder residue. Item F, tape-sealed bottle of powder and a sack. Item G, torn sack containing balloons and a plastic bag with balloons. Item H, a knife, two spoons, bottle opener, two plastic packages of cigarette papers, a key, one dollar bill, one nickel, plastic bottles and caps.

Q. Mr. Shiller, were these items analyzed by your lab? [62] A. Some of them were, yes.

Q. Okay. How many balloons contained powder? A. There were two balloons with powder.

Q. And what was the powder contained in the balloons? A. One was analyzed completely and was identified to be heroin.

Q. And the other powder, sir? A. The other was only subjected to a screening test and not identified.

Q. Not identified? A. That's correct.

Q. But was it ruled out that it was heroin? A. Yes. That conclusion was reached based on the tests that it was not heroin.

Q. Was not heroin? A. Yes, sir.

Q. Was it cocaine? A. No, it was not.

Q. And it was a powdery substance, wasn't it? A. Yes, sir.

Q. You, yourself, didn't do these analyses; is that correct? A. No, I did not.

Q. Now, Mr. Shiller, these — the powder in these two balloons was subjected to chemical analysis; is that correct? [63] A. Yes.

Q. And was it possible to identify the substance without subjecting it to chemical analysis? A. No.

Q. Mr. Shiller, I'll show you right in front of you is what has been identified as Defendant's Exhibit B and given that these are small balloons and your experience as a chemist — for how many years, sir? A. Nineteen years.

Q. Nineteen years as a chemist, and how many years with the lab work — forensic scientist? A. Oh, 18 years.

Q. Eighteen years as a forensic scientist? A. Yes, sir.

Q. And you have analyzed how many — how many drug analyses have you done? Thousands? A. I couldn't say. Thousands.

Q. Thousands. Okay. Can you tell me by visually inspecting them what's in those balloons? A. No. No.

Q. Do you know of anybody who could look at those balloons and tell you visibly what was contained therein? A. With certainty, no. No, sir.

Q. It would be mere guess, wouldn't it? [64] A. Be speculation.

Q. Mere speculation. Could you feel of those? Feel those balloons. A. (Witness complies.) All right.

Q. Having felt all the balloons, could you tell with certainty — could you tell what's in any of those? A. No.

MR. BUTCHER: We pass the witness.

CROSS-EXAMINATION

BY MR. BANKSTON:

Q. Mr. Shiller, do you have with you your copy or original, I suppose, of the Fort Worth Police Department criminalistic laboratory evidence transmittal information? A. Yes, sir, I have.

Q. All right. I tell you what. Let me just — rather than — that is the original, is it not? Your original? A. Yes, sir, it is.

Q. All right. Rather than — let's have it marked for identification purposes so we can talk about it.

[State's Exhibit A, an evidence transmittal sheet is marked for identification.]

[65] BY MR. BANKSTON:

Q. All right, sir. The document you just handed me has been marked as State's Exhibit No. A, has it not? That's the same document? A. Yes, it is.

Q. And let me have this marked as A-1, maybe.

[State's Exhibit A-1, a xerox copy of State's Exhibit A, is marked for identification.]

BY MR. BANKSTON:

Q. Let me show you what's been marked for identification purposes as State's Exhibit A-1 and ask you whether or not A-1 is a xeroxed copy of the original which you have brought with you, State's Exhibit A? A. Yes, sir, it is, with the exception of some additional writing —

Q. Okay. A. — placed on it by the laboratory.

Q. What writing is that, sir? A. The lab number and the receipt information.

Q. Okay. All right, sir. The information that is contained on State's Exhibit No. A, is that a report that is prepared by somebody in your office or by some police officer? [66] A. This is prepared by the police officer or whomever is submitting evidence to the laboratory.

Q. All right, and does this report, State's Exhibit A, does it contain a list of evidentiary items that are submitted to the

Crime Lab in the case styled The State of Texas versus Clifford James Brown? A. Yes, sir, it does.

Q. All right. Mr. Shiller, were you present when these items of evidence were removed from a locked locker box in the Crime Lab? A. No, sir.

Q. Can you tell that by looking at the transmittal sheet itself? A. I can tell, and I was not present.

Q. Okay. Would you please tell the Court what the first item of evidence listed on that report is on State's Exhibit A? A. On State's Exhibit A the first item listed is brown paper bag containing — the first item beyond that?

Q. No. Just the — A. Oh. Okay.

Q. Brown envelope containing what, sir? A. Brown envelope containing a clear plastic vial containing a green balloon tied at one end and a small amount of [67] white powdery substance. Then in parentheses, envelope marked "A.";

Q. Now, in reference to that item itself, the item that was marked and labeled as the vial and the green balloon, can you tell from looking at the analytical report there, report containing the analysis, whether or not the Crime Lab did a test on that particular item, the green balloon and the white powdery substance?

MR. BUTCHER: Your Honor, we object to any tests they did or any results of the tests would be completely irrelevant to the question of the search or the abilities on the other issues that were raised. Issue raised was the — an expert's testimony as to ability to recognize and identify the contents of a balloon. Nothing to do —

MR. BANKSTON: If I recall correctly, I asked him what the results of that test is. I simply want to clarify we're talking about the green balloon.

THE COURT: I'll overrule —

MR. BANKSTON: As opposed to just a balloon.

THE COURT: I'll overrule the objection at this point. You may answer the question.

THE WITNESS: Yes, sir.

[68] BY MR. BANKSTON:

Q. All right. So, put my question back in perspective, your answer was, "Yes, sir," that there was an analyses done on the contents of the green balloon? A. That's correct.

Q. All right, and what was the result of that analysis? A. Heroin.

Q. All right. Now, did you—did your Crime Lab also have an occasion to perform any kind of analysis on the marijuana or green leafy substance that was submitted? A. Yes, sir.

Q. All right, and what was the result of that test? A. The results of the tests on the green leafy substance was that it was marijuana.

Q. Mr. Shiller, as a criminalist for the City of Fort Worth Police Department, have you ever had an occasion to examine contents of balloons such as has been exhibited here to you by defense counsel marked as Defendant's Exhibit No. B, I believe? Before, have you—have you seen anything like these before? A. Yes, sir, I have.

Q. Is it uncommon or is it very common? A. It's very common.

[69] Q. Do you have items of evidence that are submitted to your Crime Lab all the time in containers such as those that are marked for identification purposes as Defense Exhibit No. B? A. Yes, sir, I do.

Q. And do you find that it's common or uncommon to discover there is some controlled substance quite frequently housed or contained in balloons such as those? A. That is a common finding.

Q. And, of course, on the other hand, I'm sure you sometimes examine the contents of balloons such as that and find that there are not controlled substances in there; is that correct? A. That's correct.

MR. BANKSTON: I believe that's all the questions we have, Judge.

REDIRECT EXAMINATION

BY MR. BUTCHER:

Q. In your examination of these, you say that sometimes there is controlled substances and sometimes there's not controlled substances; isn't that correct? A. Yes, sir.

Q. In fact, in this case, there was one balloon you analyzed or your lab analyzed, found what they thought to be a controlled substance, and one which there was no controlled [70] substance; is that correct? A. Well, the testing was structured to pick up only two controlled substances, either heroin or cocaine. These not being found, there was no further testing conducted.

Q. In fact, you can't say, or can you say what that other substance was? A. No.

Q. You have no idea? A. Can't say, no, sir.

Q. No idea at all? A. No.

Q. And you are a chemist for 19 years? A. Yes, sir.

MR. BUTCHER: That's all we have, Your Honor.

MR. BANKSTON: No further questions.

THE COURT: All right, you may step down, Mr. Shiller. Thank you, sir. Gentleman, may this witness be excused to return to his duties?

MR. BUTCHER: Yes, sir, you may be excused.

THE COURT: Thank you, Mr. Shiller. You may return.

[Witness is excused.]

THE COURT: Will the defense have anything further, gentlemen?

[71] MR CARTER: That's all the defense has at this time, Your Honor.

THE COURT: Defense rests at this time?

MR. CARTER: Yes.

THE COURT: Has the State further evidence?

MR. BANKSTON: No, Your Honor. State closes.

MR. CARTER: Defense closes, Your Honor.

(Arguments of counsel omitted in printing.)

[73] THE COURT: All right, Mr. Carter. Gentlemen, under the evidence and argument of counsel that the Court has heard in the Defendant's Motion to Suppress in this case, the

Court is of the opinion that the motion should be denied and the Court hereby denies the same, to which, of course, the Defendant has his exception and objection. All right. We will be in recess, gentlemen. Thank you.

OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS

CLIFFORD JAMES BROWN, Appellant

v.

THE STATE OF TEXAS, Appellee

OPINION

This appeal is taken from a conviction on appellant's plea of nolo contendere to the offense of possession of heroin. The trial court assessed punishment at four years imprisonment pursuant to a negotiated plea bargain. On December 11, 1979 the trial court conducted a hearing on appellant's motion to suppress. Immediately following the trial court's denial of that motion, appellant was then tried before the judge, and his plea of nolo contendere was entered. During his trial on the merits the evidence adduced at the pretrial hearing was offered into evidence as a stipulation. In appellant's sole ground of error he complains that the trial court erred in denying his motion to suppress because the evidence was seized in contravention of the Fourth Amendment of the United States Constitution, and the Texas Constitution, Article I, § 9. Appellant contends that the search was conducted without a warrant, and does not come within any recognized exception to the warrant requirement. The State urges that the "plain view" exception to the warrant requirement should apply here.

However, in order to determine if we may reach this ground of error we must initially delve into the provisions of Article 44.02, V.A.C.C.P.[1]

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[1]Article 44.02 provides that "A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial. . . ." And such an accused must be so admonished pursuant to Article 26.13(a)(3), V.A.C.C.P.

At the outset we note that Article 44.02, supra, specifically applies with equal force to either pleas of guilty or pleas of nolo contendere, in which there has been a plea bargain accepted by the trial court.[2] See Article 27.02(6), V.A.C.C.P., *Sowell v. State*, 503 S.W.2d 793, 795 (Tex.Cr.App. 1974) and *Lucero v. State*, 502 S.W.2d 750, 752 (Tex.Cr.App. 1973). Secondly, an erroneous ruling on a motion to suppress will not vitiate a conviction where the evidence sought to be suppressed is not introduced, and the nolo contendere plea is supported by independent evidence, other than that contested by the motion. *Ferguson v. State*, 571 S.W.2d 908, 909 (Tex.Cr.App. 1978), and *Brewster v. State*, 606 S.W.2d 325, 328 (Tex.Cr.App. 1980), and cases cited therein.

Here, although the heroin itself was not introduced, there was the stipulated testimony of the chemist who analyzed the contents of a particular green balloon. This testimony is also the fruits of the arrest and search, *Brewster*, supra, at 328.

As to the question of any independent evidence which remains unchallenged and whether it is sufficient to support a conviction, we wrote in *Brewster*, supra at 328:

> "The review exercise is much like the search of the appellate record for a judicial 'confession' or 'admission' deemed adequate to show guilt notwithstanding an unauthorized oral stipulation, a flawed written stipulation or some similar defect in evidencing guilt. See the exhaustive treatment, pro and con, in *Dinnery v. State*, 592 S.W.2d 343 (Tex.Cr.App. 1980) . . . ."

Our search of the record in this case reflects that the evidence introduced at the pretrial hearing primarily consisted of the testimony by the arresting officer, Patrolman Maples. The only other witness called was the director of the crime laboratory of the Fort Worth Police Department, who

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[2] In *Prochaska v. State*, 587 S.W.2d 726 (Tex.Cr.App. 1979) we held that where there is no plea bargain pursuant to Article 44.02, supra, any claimed deprivations of constitutional guarantees against unreasonable searches and seizures and defective confessions are waived by entering a plea of guilty, and thereby reaffirmed the rule of *Helms v. State*, 484 S.W.2d 925, 927 (Tex.Cr.App. 1972).

appeared as the result of appellant's subpoena. His testimony consisted largely of a report of the items seized, and that, among other things, there were two balloons found to be containing a powder; one was identified to be heroin, and one was not. Appellant did not take the stand and, as mentioned, his trial was held immediately thereafter.

During this trial appellant made no oral or written stipulations of evidence that could be characterized as a judicial confession, i.e., there is no statement that the allegations of the indictment were true and correct. Neither was he sworn in as a witness before the careful trial judge admonished him and then accepted his plea of nolo contendere and the negotiated plea bargain. Cf. *Dinnery v. State*, 592 S.W.2d 343 (Tex.Cr.App. 1980). In fact, great care was taken to inform appellant of his right to appeal the ruling, as the following excerpt from the transcription of the court reporter's notes demonstrates:

"THE COURT: All right.

Now, the Court finds that prior to your entering your plea of nolo contendere in this case, this Court conducted a hearing in open Court on the record in regard to the motion filed on your behalf by your attorneys, same being a Motion to Suppress the Evidence.

The Court further finds as a fact that at the hearing and trial on your plea of nolo contendere, that you did not take the witness stand and did not judicially confess to the offense charged against you in this Indictment.

It is the understanding of the Court, therefore, that though you do not have a right to appeal for your conviction on your plea of nolo contendere in this case, you do have a right to appeal this Court's decision on the Motion to Suppress.

Now, those being the circumstances, do you wish at this time to give notice of your intention to appeal this conviction and the Court's decision, or do you wish to waive that right as you waived your right to a trial by jury?

THE DEFENDANT: I want to appeal."

Thus we hold that appellant has successfully navigated the procedurally hazardous passageway of Article 44.02, supra, and preserved his right to appeal denial by the trial court of his motion to suppress. Having reached the search and seizure issue, we now reverse the ruling of the trial court, because we believe that the instant seizure cannot be validated on the strength of the facts before us.

The facts show that Officer Maples stopped appellant's 1970 Buick on the evening of June 18, 1979 as part of a routine and nonrandom license check being operated in the 1200 block of East Allen Street in East Fort Worth. When asked to produce his driver's license, appellant put his hand into the right front pocket of his trousers. On direct examination, Patrolman Maples testified as follows:

"Q [Prosecutor]: When he put his hand in his pocket, did you do anything with the flashlight?

A: Not immediately, I didn't.

Q: All right.

Was there — you say not immediately. Did you at some point in time shine the light in the car?

A: Yes, sir, I did.

Q: All right, and why did you do that?

A: His hand was in his pocket too long and it worried me.

* * * * * * *

Q: All right, and he pulled his hand partially out of his pocket. Was there anything in his hand?

* * * * * * *

A: There were two items. There was a, what I believe was a dollar bill that was partially folded and there was a small green balloon stuck between his fingers."

On cross examination the following testimony was elicited:

"Q [Defense Attorney]: Now, basically, as a matter of fact, your arrest of Clifford James Brown was based on your suspicion that he did have a controlled substance in that balloon; is that correct?

A: Yes, sir, that is.

Q: Could you describe the size of the balloon for us, Officer?

A: It was a tip end of a — I can't — well, it was a balloon, probably would be about as large, you know — not filled with anything — just my little finger and it was just about that much (indicating) of the tip end of a balloon.

Q: When you say that much, could you give the reporter an estimate of the size and length that you are talking about?

A: Probably mashed down the balloon was maybe probably less than an eighth of an inch, but it was probably half of an inch long, maybe, from the tip to where it's tied.

Q: Is that what you based your arrest of this gentleman on?

A: Yes, sir.

Q: The sight of that balloon?

A: Yes, sir, that's correct."

Appellant then looked in the glove compartment of the car, still seeking his driver's license; as he did so the officer testified that he saw some empty plastic vials, a white powdery substance which was later determined not to be a controlled substance, and a bag of party balloons. More importantly on direct examination, the officer candidly admitted the following:

"Q [Prosecutor]: All right.

Have you ever made any arrests personally or been involved in any sort of situations where arrests were made where narcotics were stored in a plastic vial of the same nature that you saw in the glove box?

A: Personally I haven't seen it in the plastic vials."

After the green balloon was dropped on the seat, Patrolman Maples ordered appellant to exit the car; he then reached into the car and seized the green balloon.

We do not here question either the validity of the officer's initial stop of appellant's vehicle as a part of a license check. Cf. *Faulkner v. State*, 549 S.W.2d 1 (Tex.Cr.App. 1976), nor the propriety of the arrest since appellant failed to produce a driver's license. What we *do* question is the sole argument

advanced by the State that the green balloon seized was in "plain view" incident to a lawful arrest.

Significantly, the state overlooks the first limitation on the "plain view" doctrine: "[T]hat plain view *alone* is never enough to justify the warrantless seizure of evidence." [Emphasis in original] *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S.Ct. 2022, 2039, 29 L.Ed.2d 564 (1971).

For the plain view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. This "immediately apparent" aspect is central to the plain view exception and is here relied on by appellant.[3] *Howard and Coolidge*, both supra. In this case then, Officer Maples had to know that "incriminatory evidence was before him when he seized the balloon." *DeLao v. State*, 550 S.W.2d 289, 291 (Tex.Cr.App. 1977).

In *Duncan v. State*, 549 S.W.2d 730, 732 (Tex.Cr.App. 1977) the Court wrote:

> "Even though we are aware of the popular use of plastic bags as containers for controlled substances we cannot hold that the bag itself is contraband in the absence of some showing that the officer saw what appeared to be a contraband substance in the bag."

Similarly, *Nicholas v. State*, 502 S.W.2d 169 (Tex.Cr.App. 1973) dealt with the seizure of photographic negatives; in *DeLao v. State*, supra, 550 S.W.2d at 291, the Court held that substance inside a red balloon on a window sill was not in plain view.

Finally, in *Howard*, supra, 599 S.W.2d at 602 we wrote:

> "Officer Holland testified that given the translucent quality of the container, it was impossible to determine the nature

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[3] As we wrote in *Howard v. State*, 599 S.W.2d 597, 600 (Tex.Cr.App. 1979): "While this Court continues to revisit the *Taylor* doctrine [from *Taylor v. State*, 421 S.W.2d 403, 407 (Tex.Cr.App. 1967)] from time to time, see, e.g., *Duncantell v. State*, 563 S.W.2d 252, 256 (1978), it has examined each precise fact situation to determine that after the traffic stop each movement made by an officer is factually and legally justified . . ." See also cases cited in n. 8, in *Howard*, supra, for similar examinations of the record.

of the tablets therein. It is therefore clear that at the moment that the container came into 'plain view' Officer Holland had no basis for believing that its contents were inherently suspicious or that they were in fact contraband."

We hold here that opaque party balloons are to be accorded treatment similar to plastic bags and photographic negatives and translucent vials. Appellant's ground of error is sustained, and the cause is reversed and remanded.

CLINTON, Judge

(Delivered March 25, 1981)

BY: Panel 3, 4th Quarter, 1980, composed of:

Truman E. Roberts, Judge
Wendell A. Odom, Judge
Sam Houston Clinton, Judge

DISSENTING OPINION TO DENIAL OF LEAVE TO FILE STATE'S MOTION FOR REHEARING

On original submission, a panel of this Court reversed this conviction because an officer did not have probable cause to seize a balloon filled with heroin. The panel contends that "opaque party balloons are to be accorded treatment similar to plastic bags and photographic negatives and translucent vials." Thus, the presence of a balloon in plain view alone did not give an officer sufficient facts to make it "immediately apparent" that the balloon contains contraband.

The basic premise in any warrantless search and seizure case is that they are per se illegal, except for a few specifically established and well-delineated exceptions. *Katz v. United States*, 359 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is also well established that under certain circumstances the police may seize evidence in plain view without a warrant, *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). However, the doctrine of "plain view" does have three criteria: (1) a prior justification for an intrusion; (2) an inadvertent discovery of incriminating evidence; (3) which is immediately apparent *to the officer. Coolidge v. United States*, supra.

More recently, the United States Supreme Court held in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), that:

> ". . . The seizure of property in plain view involves no invasion of privacy and *is presumptively reasonable*, assuming that there is *probable cause to associate the property with criminal activity* . . . . (Emphasis added) 445 U.S. at 586, 100 S.Ct. at 1380.

Therefore, our judicial inquiry focuses upon the State's ability to prove the officer has probable cause to *associate* the party balloon with criminal activity.[1]

Probable cause in our context requires that "the facts and circumstances within the (officer's) knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe" that the balloon contained contraband. *Berger v. New York*, 388 U.S. 41, 55, 87 S.Ct. 1873, 1881, 18 L.Ed.2d 1040, 1050 (1967); *Barber v. State*, 611 S.W.2d 67 (Tex.Cr.App. 1981). The issue turns to whether an officer, relying on years of practical experience and knowledge commonly accepted, has probable cause to seize the balloon in plain view.[2]

As more aptly stated by the United States Supreme Court, these principles are:

> ". . . imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person—and for *action* on that suspicion." (Emphasis added)

United States v. Cortez, —— U.S. ——, ——, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981). Accord, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 693 (1975).

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[1]A type of item used in the storage or transportation of contraband, or that item's transparency or opacity should be supporting facts, but not be controlling issues. The controlling facts derive from the surrounding circumstances to support or reject the "probable cause" for the seizure. See, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Reeves v. State*, 597 P.2d 727 (Alaska 1979). Having said this, however, some objects may be so closely associated with criminal activity as to support the probable cause element by themselves.

[2]The plain view doctrine does not require an officer to have absolute proof of the incriminating nature of the balloon. *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Only a chemical analysis could prove the contents to be contraband.

Under *Cortez*, the objective and seemingly innocuous fact of a tied-off balloon combined with the permissible deduction that it is commonly linked to heroin forms a legitimate basis to the trained law enforcement officer for suspicion. This legitimate suspicion supports the probable cause element to "associate the (balloon) with criminal activity." *Payton v. New York, supra.* Thus, under the facts of our case, the seizure of the balloon in "plain view" is presumptively reasonable and should be upheld.

Indeed, this Court's prior decisions accepted such logic. In *DeLao v. State*, 550 S.W.2d 289 (Tex.Cr.App. 1977), we held:

> "The State urges that it is a well known fact that heroin is kept in balloons. The *officer's testimony, however, does not demonstrate that he was cognizant of this 'well known' fact or immediately aware that heroin was in the balloon at the time of the seizure. Coolidge v. New Hampshire, supra; Nicholls v. State, supra*, 502 S.W.2d 169 (Tex.Cr.App.). *The seizure must be based on what was known by the officer at the time he acted*, yet this record contains not a scintilla of evidence that the officer knew what the State now alleges in its brief on appeal is a 'well known' fact. The *burden was on the State to show facts authorizing the seizure here challenged. Had the State produced any evidence on this issue, there might have been shown a basis for its claim on appeal, but this was not done.*" (Emphasis added) 550 S.W.2d at 291.

More importantly is the explicit holding of *Simpson v. State*, 486 S.W.2d 807 (Tex.Cr.App. 1972). In *Simpson*, this Court unanimously upheld a warrantless seizure of "capsules" of heroin because the arresting officer recognized them as contraband. *DeLao* and *Simpson* both recognized the validity and importance in the experience and training of law enforcement officers.

These cases are clearly distinguishable from the photographic negative and translucent vial cases. Photographic negatives can and do represent such diverse subject matters that they cannot warrant a "man of reasonable caution" to believe they contain contraband. Similarly, translucent vials which commonly contain legally obtained prescriptions render

the presence of contraband vague and uncertain. The officer knows the vials contain drugs or even narcotics for that is their purported use. However, without other supporting facts, it is this inherent use that prevents the "man of reasonable caution" from having probable cause to believe the presence of contraband. Photographic negatives and translucent vials do not permit permissible deductions that contraband is present. *United States v. Cortez, supra.*

Such is not the case of tied-off balloons in plain view. The use of balloons or similar containers has been shown to be commonly associated with the distribution, packaging, and transportation of controlled substances—usually heroin. See, e.g., *State v. Washington*, 117 Ariz.App. 207, 496 P.2d 633 (Ariz.App. 1972) (balloons); *State v. Grady*, 548 S.W.2d 601 (Mo.App. 1977) (condoms); *State v. James*, 169 So.2d 89 (La. 1964) (finger stalls). Many jurisdictions have recognized the realities of the drug culture and hold that balloons are a common package for heroin. The view I advocate is neither novel or unique. Other jurisdictions have held that a rolled, tied-off balloon *supports probable cause* and, if seen in plain view, can be validly seized under the Fourth Amendment. *Ponce v. Craven*, 409 F.2d 621 (9th Cir. 1969); *People v. Montoya*, 185 Colo. 299, 524 P.2d 76 (Colo. 1974); *State v. Broadnax*, 25 Wash.App. 704, 612 P.2d 391 (Wash.App. 1980); *People v. Simmons*, 19 Cal.App.2d 960, 97 Cal.Rptr. 283 (Cal.App. 1971); *People v. Garcia*, 541 P.2d 1268 (Colo.App. 1975); also see, *Commonwealth v. Lawson*, 309 A.2d 391 (Pa. 1973); *Reeves v. State*, 599 P.2d 727 (Alaska 1979). Furthermore, balloons have become so well known for their relation to narcotics that they have been included in the Model Drug Paraphernalia Act (MDPA) and legislatively adopted.[3] See, *Mid-Atlantic v. Maryland*, 500 F.Supp. 834 (Md.D. 1980).

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[3]Texas has recently amended the Controlled Substances Act by adding a new subsection which classifies as paraphernalia a "balloon . . used or intended for use in packaging small quantities of a controlled substance." V.T.C.S. Article 4476-15, Section 1.02(29)(I) (effective September 1, 1981). For other jurisdictions that have adopted similar provisions, see, *Mid-Atlantic v. Maryland, supra.*

Accordingly, I would hold the seizure in plain view valid because: (1) the officer had a legitimate and prior justification for an intrusion into appellant's car (routine and non-random license check); (2) the discovery of the balloon was inadvertent; and (3) the incriminating nature of the balloon was immediately apparent *to the officer. DeLao v. State, supra.* At trial, the officer testified that the rolled, tied-off, opaque balloon was mashed down to approximately one-eighth of an inch thick and one-half inch in length. Based on his specific knowledge and prior experience with the drug culture, the officer associated the balloon with contraband. The balloon, in plain view, formed "a legitimate basis for suspicion . . . and for action on that suspicion. *United States v. Cortez, supra,* —— U.S. at ——, 101 S.Ct. at 695; *DeLao v. State, supra.*[4]

I respectfully dissent.

McCormick, Judge

(Delivered July 1, 1981)
En Banc
Dally, J., and W. C. Davis, J., join in this dissent.

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[4]Although the panel relies in part on *DeLao v. State, supra,* that case is clearly distinguishable. *DeLao,* however, is supportive of there being sufficient evidence to support the probable cause element to associate the balloon with criminal activity. The panel opinion overrules that language in *DeLao* expressing this Court's belief that an officer's experience and training forms a basis for justifying the seizure.

JUDGMENT AND MANDATE OF THE COURT OF CRIMINAL APPEALS OF TEXAS

TRIAL COURT NO. 17,586

THE STATE OF TEXAS

To the 213th JUDICIAL DISTRICT COURT OF TARRANT County, Greeting:

Before our Court of Criminal Appeals, on the 1st day of July A.D. 1981, the cause upon Appeal to revise or reverse your judgment between

CLIFFORD JAMES BROWN Appellant,

NO. 65,431

VS.

THE STATE OF TEXAS, Appellee

was determined, and therein our said Court of Criminal Appeals made its order in these words:

"This cause came to be heard on the Transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be reversed and the cause remanded for further proceedings in accordance with the opinion of this Court and that this decision be certified below for observance."

The Motion for Leave to File State's Motion for Rehearing is Denied.

WHEREFORE, we command you to observe the order of our said Court of Criminal Appeals, in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said Court of Criminal Appeals, with the seal

thereof annexed, at City of Austin, Texas, this 3rd day of July, A.D. 1981.

THOMAS LOWE
Clerk

/s/ Belva Myler
Deputy Clerk

Opposition

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-419

THE STATE OF TEXAS
Petitioner

v.

CLIFFORD JAMES BROWN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S MEMORANDUM IN OPPOSITION

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ATTORNEYS FOR THE RESPONDENT

IN THE

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No. 81-419

THE STATE OF TEXAS
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S MEMORANDUM IN OPPOSITION

The Respondent, CLIFFORD JAMES BROWN, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Court of Criminal Appeals of Texas in this case. That decision is reported at 617 SW2d 196 (1981).

QUESTION PRESENTED

Does a peace officer run afoul of the Fourth Amendment to the Constitution of the United States or the prohibitions of Article 1, Section 9 of the Constitution of the State of Texas, or Articles 1.06 or 38.23 of the Texas Code of Criminal Procedure when he makes a warrantless seizure of a balloon which he observes in plain view and in which he "suspects" or "believes there might be" controlled substances?

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

CONSTITUTION OF THE STATE OF TEXAS, 1876

Article I, Section 9

Searches and Seizures

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, support by oath or affirmation.

TEXAS CODE OF CRIMINAL PROCEDURE

Article 1.06

Searches and Seizures

The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation.

TEXAS CODE OF CRIMINAL PROCEDURE

Article 38.23

Evidence Not to be Used

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the

State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

MEMORANDUM OPPOSING CERTIORARI

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The State's Petition completely ignores the fact that the decision of the Texas Court of Criminal Appeals is grounded on provisions of the Texas Constitution and the Texas Code of Criminal Procedure and not on the United States Constitution.

The Respondent's Suppression Motion (reproduced on pages A-22 and A-23 of the State's Petition) cites its bases in paragraph 3 which states:

> The above described search was unreasonable and illegal in violation of the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution, because it was conducted without warrant . . . (emphasis added).

The very last sentance of the Respondent's Brief on Appeal to the Texas Court of Criminal Appeals summarized his position saying:

> The seizure of the balloon and the arrest of the Appellant were in conflict with the 4th Amendment of the United States Constitution, Article I of the Texas Constitution and Article 38.23 of the Texas Code of Criminal Procedure (emphasis added).

A close reading of the opinion of the Texas Court of Criminal Appeals in this cause (reproduced in the State's petition, pages A-1 through A-12) does not indicate the Texas Court relied on anything other than the Texas Constitution and Texas Statutes in resolving this issue.

The United States Supreme Court is the final authority on provisions of the United States Constitution and on conflicts between the Federal Constitution and all other constitutions and statutes. Questions regarding the requirements of state laws and state constitutions, however, are the province of the state courts so long as their actions do not "sink below the federal court's low water mark". See Lego v. Twomey, 404 US 477 (1972); Commonwealth v. Ware, 406 US 910 (1972). This position has been articulated on several occasions by various members of the Court.

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Mr. Justice Jackson in Herb v. Pitcairn, 324 US 117 (1945).

> In addition to the importance of avoiding jurisdictional difficulties, it seems much the better policy to permit the state court the freedom to strike its own balance between individual rights and police practices, at least where the state court's ruling violates no (federal) Constitutional prohibitions. It is peculiarly within the competence of the highest court of a state to determine that in its jurisdiction whether the police should be subject to more stringent rules than are required as a federal Constitutional minimum. Oregon v. Haas, 420 US 714, 728 (1975) (Mr. Justice Marshall dissenting, emphasis added).

> . . . . it is appropriate to observe that no state is precluded from adhering to higher standards under state law. Each state has power to impose higher standards governing police practices under state law than is required by the federal Constitution. Michigan v. Mosely, 423 US 96, 120 (1975) (Mr. Justice Brennan, dissenting, emphasis added).

The Petitioner presents three reasons why certiorari should be granted:

I. The Texas Court of Criminal Appeals decided a "federal question" "in a way which conflicts with applicable decisions of this Court".

II. This decision of the Texas Court of Criminal Appeals conflicts with decisions of the supreme courts of Colorado and certain other enumerated states.

III. The decision of the Texas Court of Criminal Appeals presents a federal question in that Texas police officers are forced to "ignore circumstances which their professional experience and training tell them are violations of the law".

Each of these is based on a "federal question presented" or on the need to have the United States Supreme Court resolve conflicts between the Texas law and that of several other states. The Respondent respectfully suggests that there is no federal question involved in this case. This case presents a question which is strictly a matter of the laws and Constitution of the State of Texas and the Texas Court of Criminal Appeals is the final authority in such a question and it has spoken.

The fact that Texas chooses to have a higher standard regarding searches than does Colorado, California or any other state is within the authority of the legislature, the courts and the people of the State of Texas. Such decisions should not be questioned or reviewed by federal or other authority unless these actions by the State of Texas "fall below the low water mark" of United States Constitutional protections.

II.

Should the Court decide that a federal question is presented or that it is necessary for the federal courts to reduce rigorous Texas standards for police conduct to the lowest common denominator, then the attention of the Court is directed to the following items from the record in this cause.

WHAT DID THE OFFICER KNOW AT THE TIME OF THE SEIZURE

- He did not have experience as a narcotics officer (P. 5, L. 20; P.21, L. 7).
- At the time of the arrest, he did not have a list of narcotics users (p. 16, L. 15).
- When he is on patrol and "runs across situations where persons have balloons and plastic vials and things of that nature" it arouses his suspcions (p. 25, L. 22).
- He believed there might be some narcotics in the balloon (P. 35, L. 11).
- He did not name the controlled substance in his police report (P. 40, L. 20).
- The arrest was on "suspicion" there was a controlled substance in the balloon (P. 40, L. 24; P. 47, L. 9; P. 52, L. 23).
- He was "not certain" what was in the balloon (P. 41, L. 23).
- He could not tell anyone at the crime lab what was in the balloon (P. 42, L. 7).
- At the time of the arrest he did not know what was in the balloon (P. 47, L. 13).
- At the time of the hearing he did not know what was in the balloon (P. 47, L. 17).
- "It would be impossible to say with any degree of certainty what was in the balloon taken from the Defendant on the night of June 18, 1979" (P. 51, L. 18).
- At the time of the arrest, he did not know if the balloon was or was not solid rubber (P. 51, L.25) or contained any kind of powder (P. 52, L. I).
- As far as he knew, at the time of the arrest, the balloon could have contained anything (P. 52, L. 10).

THE BALLOON ITSELF

- Was "an ordinary green party balloon" (P. 20, L. 23)
- Other balloons were found in the car (P. 30, LL. 16, 17).

- There were two balloons filled with powder seized from the Defendant that night, one contained heroin (P. 62, LL. 5,6) the other contained an unknown powder (P. 62, LL. 13, 14).

Thus the ruling of the Texas Court of Criminal Appeals squares with the holdings of this Court in Coolidge v. New Hampshire, 403 US 443 (1971). The officer "believed" the balloons "might" contain narcotics (interestingly one balloon did and one did not, see Statement of Facts, P. 62, LL. 13, 14), such situations "aroused his suspicion"; he was "not certain" what was in the balloon -- and so on. Even under the less stringent requirements of the federal courts' interpretations of the 4th Amendment of the United States Constitution, this search falls below the permissible.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Number 81-419

THE STATE OF TEXAS, Petitioner

v.

CLIFFORD JAMES BROWN, Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Respondent, CLIFFORD JAMES BROWN, asks leave to file the attached Respondent's Brief in opposition to the Petition of the State of Texas to the Court of Criminal Appeals of Texas without prepayment of any costs and to allow him to proceed in forma pauperis pursuant to Rule 46.

The Respondent's affidavit in support of this motion is attached hereto.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-419

THE STATE OF TEXAS
Petitioner

v.

CLIFFORD JAMES BROWN
Respondent

AFFIDAVIT

I, CLIFFORD JAMES BROWN, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis and without being required to prepay costs of fees: 1. I am the Respondent in the above entitled cause. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that the State of Texas is not entitled to the redress they seek in said cause.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed. I last worked for my brother-in-law who operates a paint and body shop. This was on a part-time, as needed, basis for which I usually received about $125.00 per week. My last work there was in August, 1981. Since that time my brother-in-law has not needed any help and I have not been able to secure other work.

2. I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

3. I do not own any cash or checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing).

5. I have no dependents other than myself.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Clifford J. Brown
CLIFFORD JAMES BROWN

THE STATE OF TEXAS §
§
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority on this day personally appeared CLIFFORD JAMES BROWN and stated to me that the above and foregoing Affidavit is true and correct.

SIGNED this 21 day of September, 1981.

Bessie A Harrison
DEPUTY DISTRICT CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-419

THE STATE OF TEXAS
Petitioner

v.

CLIFFORD JAMES BROWN
Respondent

PROOF OF SERVICE

I hereby certify that I am a member of the Bar of this Court and am Counsel of Record for the Respondent in the above cause. I further certify that on this the 28th day of September, 1981, one copy of the Respondent's Memorandum in Opposition was mailed, first class, postage prepaid, to the Honorable C. Chris Marshall, Chief of the Appellate Section, Tarrant County Criminal District Attorney's Office, 200 West Belknap Street, Fort Worth, Texas 76102. He is the attorney for the Petitioner. I further certify that all parties required to be served have been served.

Allan K. Butcher

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE STATE OF TEXAS
Petitioner

v.

CLIFFORD JAMES BROWN
Respondent

FILING STATEMENT

THE STATE OF TEXAS

COUNTY OF TARRANT

BEFORE ME, the undersigned authority, on this day personally appeared ALLAN K. BUTCHER, a person known to me, who being first duly sworn did state:

My name is Allan K. Butcher. I am a member of the Bar of the Supreme Court of the United States and am the counsel of record for the Respondent in the above entitled and numbered cause. I have personal knowledge that the Respondent's Memorandum in Opposition for the above case was deposited in the Main United States Post Office in Fort Worth, Texas, during normal business hours on September 28, 1981, with first class postage prepaid. The Memorandum in Opposition was addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543.

Allan K Butcher
ALLAN K. BUTCHER

SIGNED AND SWORN TO BEFORE ME, the undersigned authority, on this the 28th day of September, 1981.

Notary Public in and for
Tarrant County, Texas.

Petitioner's Reply Brief

1

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FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF TEXAS,
Petitioner

vs.

CLIFFORD JAMES BROWN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITIONER'S REPLY BRIEF

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THE STATE OF TEXAS,
Petitioner

vs.

CLIFFORD JAMES BROWN
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner's Reply to the

Brief in Opposition to Certiorari

The decision below rested entirely on the Texas court's interpretation of the "plain view doctrine" of the Fourth Amendment of the United States Constitution, as announced in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971), the court below having in fact advanced *no* state law ground for its decision.

Petitioner finds no support in the opinion below for Respondent's assertion that a "close reading" of that opinion reveals that the decision was based on either state consti-

tutional or state statutory grounds. In fact, as soon as the court below began addressing the legal merits of the search question, it immediately cited *Coolidge* as the controlling authority, in the following manner:

> ...What we do question is the sole argument advanced by the State that the green balloon seized was in "plain view" incident to a lawful arrest.
>
> Significantly, the state overlooks the first limitation on the "plain view" doctrine: "[T]hat plain view *alone* is never enough to justify the warrantless seizure of evidence." [Emphasis in original] *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S.Ct. 2022, 2039, 29 L.Ed.2d 564 (1971).

617 S.W.2d at 200.

It then cited *Coolidge* and *Howard v. State*, 599 S.W.2d 597 (Tex. Crim. App. 1979), for the proposition that Officer Maples erred because it was not "immediately apparent" that the tied-off balloon contained drugs. *Howard* was itself based entirely on *Coolidge*, specifically saying that it was "following its teachings." 599 S.W.2d at 602.

The Texas court also relied on three other cases in the body of its opinion for its interpretation of plain view doctrine: *DeLao v. State,* 550 S.W.2d 289 (Tex. Crim. App. 1977); *Duncan v. State,* 549 S.W.2d 730 (Tex. Crim. App. 1977); and *Nicholas v. State,* 502 S.W.2d 169 (Tex. Crim. App. 1973). Petitioner finds that in each of these cases the court below rested its decision on *Coolidge: DeLao,* 550 S.W.2d at 291; *Duncan,* 549 S.W.2d at 732, *Nicholas,* 502 S.W.2d at 171-72.

In addition, the "*Taylor* doctrine" which the court below referred to at footnote three of its opinion, [*Taylor v. State,* 421 S.W.2d 403 (Tex. Crim. App. 1967)], is also predicated entirely, and expressly, on Fourth Amendment law. Decided prior to *Coolidge,* it cited only federal cases for its resolution of a "plain view" issue. 421 S.W.2d at 407.

Petitioner can find no place in the legal arguments in the opinion below where the Texas court has even cited, much less relied on, the various state law provisions alluded to by Respondent in his Brief in Opposition, those provisions being Art. I, §9 of the Texas Constitution and arts. 1.06 and 38.23 of the Texas Code of Criminal Procedure. Nor are those state law provisions cited or relied on in any of the Texas decisions mentioned in the opinion below.

Moreover, the dissenting opinion below is devoid of any hint that state law was involved. Instead it cites numerous opinions of this Court to show the error in the majority opinion, placing primary reliance on *Coolidge, Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371 (1980) and *United States v. Cortez,* ____ U.S. ____, 101 S.Ct. 690 (1981). It is obvious that both factions in the Texas court saw the issue as one of federal law.

What a "close reading" of the Brief in Opposition reveals is that Respondent *offered* the supposed state law grounds as alternate theories of decision, both in his motion to suppress and in his appellate brief. However, Respondent does not point out where the court below *accepted* the offer and made state law a basis for its decision.[1]

This Court has recently reviewed a case in which it rejected a similar "independent and adequate state ground" argument. In *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct.

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1. The Texas court has shown an ability to clearly base a decision on state law grounds when that is its intent. See *Howard v. State,* 617 S.W.2d 191 (Tex. Crim. App. 1981) (declining as a matter of state law to follow *Michigan v. DeFellippo,* 443 U.S. 31, S.Ct. 2627 (1979)).

1215 (1975), this Court held that the fact that the Oregon court did not cite state law and in fact sought to distinguish a decision of this Court showed that the decision was grounded on federal law. Specifically, this Court said:

> Although Oregon has a constitutional provision against compulsory self-incrimination in any criminal prosecution, Ore.Const., Art. 1, § 12, the present case was decided by the Oregon courts on Fifth and Fourteenth Amendment grounds. The decision did not rest on the Oregon Constitution or state law; neither was cited. The fact that the Oregon courts found it necessary to attempt to distinguish Harris v. New York, *supra*, reveals the federal basis.

95 S.Ct. at 1219-20.

Similarly, in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979), it was said that "[h]ad state law not been mentioned at all, there would be no question about our jurisdiction, even though the State Constitution might have provided an independent and adequate state ground." 99 S.Ct. at 1395-96. And in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 2854 (1977), this Court said: "That the Ohio court might have, but did not, invoke state

law does not foreclose jurisdiction here."

These three cases fit the current situation like a glove. The Texas court did not cite any state constitutional or statutory provision as a basis for its decision. Instead it stated that the prosecution had run afoul of the "immediately apparent" requirement of *Coolidge*. There can be no question but that the decision below rested solely on federal constitutional law.

Although it almost gives Respondent's contention a legitimacy it does not deserve, even if Respondent's references in his motions and brief in the courts below could somehow be construed to mean that a state law question was raised, then the repeated and express reliance by the court below on the *Coolidge* plain view rules would only mean that Texas had been "compelled" to decide the state question as it did because it misunderstood federal law, in which event this Court can and does take jurisdiction. *Delaware v. Prouse*, 99 S.Ct. at 1395-96; *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S.Ct. at 2854. Thus this Court said in *Zacchini*:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the

> very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have juirisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law.

Plainly, then, this case raises a federal question of which this Court can take jurisdiction. Indeed, that Respondent so vigorously argues a state law ground for the decision below, in the face of an opinion offering no support for such a statement, shows the desperateness of his position. By arguing that Texas has adopted as a matter of state law a more stringent plain view doctrine than the Fourth Amendment mandates, [Brief in Opposition p. 5], he tacitly admits that if the decision is grounded on federal law, then the court below has read *Coolidge* too narrowly. Thus his only hope for prevailing on the merits is to keep this Court from reaching the merits.

Yet as this Court made clear in *Oregon v. Hass*, 95 S.Ct. at 1219, the states cannot, as a matter of *federal* constitu-

tional law, impose greater restrictions on police activity than this Court has chosen to impose. This is precisely what the court below has done, and this Court should rectify that error.

Although in Part II of his Brief in Opposition Respondent alludes to portions of the record allegedly showing that Officer Maples did not "know" what was in the balloon, this really does nothing more than highlight the error below--that the police have been held to a standard of knowledge or certainty, rather than probable cause, where plain view seizures are at issue.

Therefore Petitioner renews its request that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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Petitioner's Brief

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No. 81-419

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE STATE OF TEXAS, *Petitioner*

vs.

CLIFFORD JAMES BROWN, *Respondent*

On Writ of Certiorari to the
Court of Criminal Appeals of Texas

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QUESTION PRESENTED

Does a police officer run afoul of the Fourth Amendment, merely because he cannot see through the opaque packaging material being used, when he makes a warrantless seizure of a slightly bulging, tied-off balloon which he lawfully observes in plain view, where based on his professional experiences with the illicit narcotics trade, and in light of the circumstances of the exhibition of the balloon, he has probable cause to believe the balloon contains illegal drugs?

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Argument:

The seizure of the tied-off balloon at issue was proper under the "plain view" exception to the warrant requirement, as that exception was defined in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) 11

A. The stop of Respondent's vehicle during a routine, fixed-location driver's license checkpoint operation constituted a prior valid intrusion under the plain view doctrine 12

B. The officer's discovery of the tied-off balloon was inadvertent 13

C. The fact that the tied-off balloon contained contraband drugs was immediately apparent to the officer, given his professional experiences with the illicit narcotics trade and in light of the circumstances surrounding the exhibition of the balloon 14

1. "Probable cause" is the standard to be applied in determining whether the seizable nature of an item was "immediately apparent" to the officer observing that item in plain view 14

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2. In determining whether an officer had probable cause to seize an object, the courts can and should consider not only the objective facts observed by the officer, but also the inferences he was then able to draw based on his professional training and experience 20

3. A tied-off balloon is the type of distinctive package or container that may be seized without a warrant because it announces by its outward appearance that its contents are illegal drugs 23

D. The officer therefore had probable cause to believe that the balloon was subject to seizure, and exigent circumstances justified a warrantless seizure 28

Conclusion 30

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THE STATE OF TEXAS, *Petitioner*

vs.

CLIFFORD JAMES BROWN, *Respondent*

Brief for the Petitioner

OPINION BELOW

The opinion of the Court of Criminal Appeals, (J.A. 43), is reported at 617 S.W.2d 196. The formal judgment and mandate of that court appear at page 55 of the Joint Appendix.

JURISDICTION

A panel of the Court of Criminal Appeals rendered its decision reversing Respondent's conviction on March 25, 1981. On April 8, 1981, the State timely filed its motion for rehearing en banc, accompanied by its motion for leave to file for rehearing, as required by local rules. The *en banc* Court of Criminal Appeals denied the motion for leave to file for rehearing on July 1, 1981. The petition for a writ of certiorari was filed on August 28, 1981, and was granted on June 14, 1982. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Respondent Clifford James Brown was convicted, on his plea of nolo contendere, of the offense of possession of heroin. That crime was a felony of the second degree under the version of the Texas Controlled Substances Act then in effect.[1] Brown was sentenced to a term of four years in the Texas Department of Corrections but was released on bond pending the outcome of his appeal. His conviction stemmed from an incident in which he exhibited a tied-off, heroin-filled balloon to a police officer during the course of a routine driver's license checkpoint operation being conducted by officers of the Fort Worth Police Department.

Respondent filed in the trial court a motion to suppress evidence which raised the issue of an unconstitutional warrantless seizure of the balloon. (J.A. 2-4). An evidentiary hearing was held on that motion, and the motion was denied. (J.A. 3-4, 41-42). However, the Court of Criminal Appeals of Texas reversed the conviction, holding that the warrantless seizure did not fall within the "plain view doctrine" announced in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

A. Facts Giving Rise to the Seizure

During the late evening hours of June 18, 1979, Officer Tom Maples and other patrol officers of the Fort Worth, Texas, Police Department were directed to set up a driver's license checkpoint operation. (J.A. 7-8). They first established their license check at approximately 10:00 p.m. on East Rosedale Street in Fort Worth, and then about one hour later moved the location of the operation to East Allen Street. (J.A. 9-10).

The license checks at the two locations were conducted in essentially the same fashion. The officers used either their patrol vehicles or highway flares to funnel on-coming vehicles into the inside lanes of the street. (J.A. 8-11). The officers stopped every vehicle that came through the checkpoint.

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[1] TEX. GEN. LAWS 1973, ch. 429, §4.02(b)(2)(J) at 1148-49 and §4.04(a), (b)(1) at 1154 (current version at art. 4476-15, §§4.02(b)(2)(K) and 4.04(a-b), TEX. REV. CIV. STAT. ANN. (Vernon Supp. 1982)).

(J.A. 9). The purpose of the operation was to check for persons driving without a license, for the presence of vehicle inspection stickers, and for license plate (registration) infractions. (J.A. 9). The officers were not checking the drivers for possible outstanding warrants, nor had they been directed to look for any specific persons during the course of their operation. (J.A. 12). They had not been told to be on the lookout for narcotics violations, and no narcotics officers took part in the license check operation. (J.A. 9).

After the officers had been at the East Allen Street location for approximately 15 minutes, (J.A. 20), a 1970 Buick driven by Respondent came through the checkpoint and was stopped by Officer Maples. (J.A. 12). The officer had never seen Respondent before and did not know who he was. (J.A. 12, 22). Officer Maples asked Brown, the lone occupant of the vehicle, to exhibit his driver's license. (J.A. 12).

Respondent made no verbal response, but placed his right hand in his right front pants pocket. (J.A. 13). He kept his hand in his pocket long enough to alarm Officer Maples and cause the officer to shine his flashlight inside the car. (J.A. 13). When Respondent partially withdrew his hand from his pocket, Officer Maples could see two objects in Brown's hand. (J.A. 13-14). He was holding a folded dollar bill between his thumb and index finger, but wedged between the insides of his middle fingers was a small, green, opaque, tied-off balloon. (J.A. 14-15, 25). Officer Maples estimated that the balloon was tied one-half inch from its tip. (J.A. 25). His testimony seems to indicate that when "mashed down" the balloon was approximately one-eighth of an inch thick. (J.A. 25).

The officer observed that Respondent kept his hand close to his pants pocket, and he then saw the balloon drop down alongside Respondent's right leg. (J.A. 16). Respondent then reached for and opened the glove box. (J.A. 16). Inside the lighted glove box the officer observed numerous small plastic vials, all of them empty, "a lot" of loose white powder, and a bag of party balloons. (J.A. 17, 19, 30). Respondent rummaged around in the glove box and announced to the officer that he had no driver's license. (J.A. 17-18). Officer Maples

then asked him to exit his vehicle and move to the rear of the car. (J.A. 18).

After he stepped out of his car, Respondent closed the door behind him. (J.A. 18). Officer Maples shined his flashlight into the vehicle again and saw the tied-off balloon lying on the seat where Respondent had dropped it. (J.A. 18). His professional instincts sufficiently aroused, Officer Maples reached in the car and seized the balloon. (J.A. 18, 22, 28). In holding the balloon he noticed that it seemed to contain a powdery substance. (J.A. 21-22). Based on his experiences as a police officer, Officer Maples believed that some form of narcotics was in the balloon, and he then placed Respondent under arrest for possession of a controlled substance. (J.A. 22, 27-28). Later chemical analysis of the contents of the balloon showed that it contained heroin. (J.A. 36, 40).

Officer Maples had motioned for his partner to assist in the actual arrest of Respondent, following seizure of the balloon. When asked what he said to inform his partner of what had transpired, Officer Maples responded: ". . . I showed him what I had and I didn't have to say anything. He realized the situation then." (J.A. 18-19).

A subsequent inventory of the automobile revealed a large jar of milk sugar in the rear floorboard, along with several "baggies" of marijuana.[2] (J.A. 19-20, 40).

B. Facts Giving Rise to the Officer's Belief that a Tied-Off Balloon Probably Contains Narcotics

Officer Maples had been a police officer approximately five years at the time of this incident. (J.A. 6). Though he had never been a narcotics officer per se, he had participated in several arrests in which narcotics had been found in balloons

[2]The testimony of the police chemist indicates that a second powder-filled balloon was recovered. Whether this second balloon was found on Respondent's person, or elsewhere in the vehicle, is not developed in the record. This second balloon was tested to determine if it had either heroin or cocaine inside; it contained neither. No further testing of the second balloon was conducted, and its exact contents were never determined. (J.A. 36-37, 40-41).

similar to the one Respondent possessed. (J.A. 14-15). He had personally made an arrest during the previous year in which he recovered eight or nine such multi-colored balloons. (J.A. 15). He had also had conversations with fellow officers in which it was mentioned that narcotics were often kept in such ballooons. (J.A. 15). His experiences in dealing with narcotics, as well as information he had gained from others, made him suspicious of the uses to which the empty vials could have been put, though he had not personally made an arrest involving the use of that type of vial for illicit purposes. (J.A. 17). He knew about "milk sugar" from talking to narcotics users.[3] (J.A. 30). Officer Maples also knew from his experience on patrol that the area of the license check had a medium degree of narcotics traffic. (J.A. 33).

Officer Maples testified that given his experience as a patrol officer, including his experiences concerning narcotics, the presence of balloons, plastic vials, and things of that nature arouse his suspicions. (J.A. 17). He noted that he could not see inside the particular tied-off balloon at issue, (J.A. 21-22), candidly conceded that he could not be "certain" and could not "know" what was in the balloon, (J.A. 25, 28), and acknowledged that in addition to heroin or cocaine, the balloon could have had any other type of powdery substance in it. (J.A. 31). However, having seen the tied-off balloon, along with the items in the glove box, Officer Maples believed, based on his experiences as a police officer, that the green balloon contained a narcotic substance.[4] (J.A. 22, 32).

In addition, the police chemist who analyzed the contents of the balloon, and who had done such crime analysis for 18 years, testified that it was "very common" for such tied-off balloons to be submitted to him for analysis. He affirmed that

[3]The inference from the record is that the powder in the glove box was milk sugar, just as was the powder contained in the jar discovered during the inventory. However, the powder in the glove box was never specifically referred to as milk sugar.

[4]Some parts of the officer's testimony indicate that he felt he would have been justified in arresting Respondent based just on the observation of the tied-off balloon. (J.A. 31).

items are submitted to him for analysis in such containers "all the time." It is a "common finding" that controlled substances are contained in those types of balloons. By the same token, there are times when his analysis of such balloons reveals that their contents are not controlled substances. (J.A. 37, 40).

C. Rulings in the Courts Below

The trial judge denied Respondent's motion to suppress evidence, but made no specific factual findings. (J.A. 3-4, 41-42). A three-judge panel of the Court of Criminal Appeals of Texas reversed the conviction, holding that the seizure of the balloon did not fall within the "plain view" exception to the warrant requirement, as that exception was set out in *Coolidge v. New Hampshire*. The theory below was that since Officer Maples could not see inside the opaque balloon, he could not "know" what was inside, and therefore in the language of *Coolidge*, it was not "immediately apparent" to the officer that he had seizable contraband before him. The *en banc* court denied the State's motion for leave to file for rehearing, over a dissent by three of the nine judges. It was the theory of the dissenters that, when proper regard was given to the inferences that the experienced officer was able to draw when he saw the tied-off balloon, Officer Maples did have probable cause to believe that the balloon contained narcotics, and that such a showing of probable cause justified a warrantless, "plain view" seizure of the balloon.

For jurisdictional purposes the State of Texas points out that the court below rested its decision of the question presented solely on federal constitutional law. The only state law question addressed was whether Respondent had preserved his right to appeal in light of his plea of nolo contendere. See art. 44.02, TEX. CODE CRIM. PROC. ANN. (Vernon 1979).

In his motion to suppress evidence Respondent contended that the warrantless seizure of the balloon violated the Fourth Amendment. (J.A. 2-4). As soon as it began addressing the merits of the seizure question, the court below cited *Coolidge v. New Hampshire* as the controlling authority, specifically

with regard to the "immediately apparent" requirement. 617 S.W.2d at 200. (J.A. 48). The Texas court also relied on several of its prior decisions concerning the plain view doctrine: *Howard v. State*, 599 S.W.2d 597 (Tex. Crim. App. 1979); *DeLao v. State*, 550 S.W.2d 289 (Tex. Crim. App. 1977); *Duncan v. State*, 549 S.W.2d 730 (Tex. Crim. App. 1977); *Nicholas v. State*, 502 S.W.2d 169 (Tex. Crim. App. 1973). Each of these cases traces back to *Coolidge: DeLao*, 550 S.W.2d at 291; *Duncan*, 549 S.W.2d at 732; *Nicholas*, 502 S.W.2d at 171-72. The panel opinion in *Howard* referred to *Coolidge* by saying it was "following its teachings." 599 S.W.2d at 602. The dissenting opinion also relied on various decisions of this Court to argue the error in the majority's decision. The express reliance on this Court's decisions shows that the decision below rested on federal law. This invokes this Court's jurisdiction. *Oregon v. Kennedy*, 102 S.Ct. 2083 (1982); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Oregon v. Hass*, 420 U.S. 714 (1975).

SUMMARY OF ARGUMENT

Respondent exhibited a tied-off balloon to a police officer while his vehicle was stopped during a routine, fixed-location driver's license checkpoint operation. He brought the balloon out of his pocket while looking for his license. Empty vials, a quantity of loose white powder, and a bag of balloons could also be seen by the officer in the glove box of the vehicle. Because of his training and experience in narcotics enforcement, the officer believed the balloon contained drugs, and he seized it without a warrant. Laboratory analysis showed that the officer's belief was correct.

Coolidge v. New Hampshire, 403 U.S. 443 (1971), established three requirements for a valid warrantless seizure under the plain view doctrine: (1) that the officer be in a position to view the object and make the ensuing seizure because of a prior valid intrusion into an area in which the individual had a reasonable expectation of privacy; (2) that the discovery

of the item be inadvertent; and (3) that it be "immediately apparent" to the officer that the item is subject to seizure. The rationale for the doctrine is two-fold. The prior lawful intrusion is essentially a substitute for the otherwise-required necessity that a magistrate review the justification for any intrusion; the "immediately apparent" requirement is sufficient to keep the police from engaging in an impermissible general exploratory search. The exigencies then justify a warrantless seizure.

In this case the central question concerns the degree of certainty which is embodied in the phrase "immediately apparent," the court below having in effect equated that phraseology with knowledge or virtually absolute certainty and having for all practical purposes established a per se rule of lack of knowledge where an opaque container is involved. There appears to be agreement that the first two prongs of the *Coolidge* test were satisifed. The prior valid intrusion arose because Respondent's vehicle was stopped during a routine, fixed-location driver's license check in which the officers were stopping all on-coming vehicles. This type of license check was mentioned with approval in *Delaware v. Prouse*, 440 U.S. 648 (1979). The officer's discovery of the balloon was inadvertent since it came into view only when Respondent extracted it from his pants pocket while looking for his driver's license. The only substantial question is whether the sight of this tied-off balloon, coupled with the observation of possible narcotics paraphernalia in the vehicle's glove box, made it immediately apparent to an officer knowledgeable in the ways of the drug trade that the balloon contained contraband drugs.

The State of Texas contends that probable cause is the standard embodied in the phrase "immediately apparent." Though it has never addressed this question directly, this Court in *Warden v. Hayden*, 387 U.S. 294 (1967), used the term probable cause as it discussed the justification for seizing "mere evidence" in the course of a search for weapons during the pursuit of a fleeing felon. And in *Colorado v. Bannister*, 449

U.S. 1 (1981) (per curiam), the Court upheld the seizure of items observed in plain view inside a car stopped for a traffic violation where there was probable cause to believe that the items were stolen.

Use of the probable cause standard is consistent with the underlying rationale for the plain view doctrine. Since probable cause would be required to obtain a search warrant, which carries with it the right both to search and to seize, the need for probable cause would presumably remain even though the exigencies of the plain view situation would cause the warrant requirement to drop out of the analysis. To permit an officer to seize on a set of facts which would not constitute sufficient cause for the issuance of a warrant would be anomalous, at least where the seizure will deprive the individual of his property for a substantial period of time, that is, where an "investigatory" detention is not involved. At the same time, to require a degree of certainty in excess of probable cause would apparently require either the articulation of an entirely new Fourth Amendment standard not supported by the language of the Amendment itself or the transfer to the search and seizure area of standards that have previously been reserved for use in adversarial proceedings in the trial court. Either approach would serve only further to fragment and confuse Fourth Amendment law, whereas using the probable cause standard for plain view analysis would reconcile this doctrine with other branches of search and seizure law and be a small step toward making a "seamless web" of this area.

If probable cause is the appropriate standard, then the courts should, as they have traditionally done when assessing whether probable cause existed, consider both the objective facts observed by the officer and the inferences or deductions he drew from those facts as a result of his training and experience in law enforcement. This Court most recently subscribed to such a policy in *United States v. Cortez*, 449 U.S. 411 (1981), stressing in a "border stop" context that an officer's expertise may give meaning to facts that would appear innocuous to the layman. To pay lip service to the need for highly trained and experienced law enforcement officers, but then to

ignore that very training and experience when evaluating the officer's assessment of probable cause, would be illogical on its face. Yet the court below gave no legal weight to the officer's testimony that his training and field experience with the narcotics trade caused him to believe that the tied-off balloon was a sign of narcotics packaging. We believe this was error.

In *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *Robbins v. California*, 453 U.S. 420 (1981), this Court held that as a general rule a warrant is required before a container may be searched. However, it said that no warrant is required if the expectation of privacy concerning the contents of the container has been sacrificed because: (1) the container is open and physically exposes its contents to view; or (2) the container is closed, but by its transparency, configuration, or otherwise, for all practical purposes announces its contents to an observer—the latter being the functional equivalent of an open container. The State submits that these two exceptions to the warrant requirement for containers deal with "plain view" seizures. They are another way of stating the immediately apparent/probable cause requirement of the plain view doctrine, albeit with special reference to the particular problems arising when a container is involved. In this case the tied-off balloon, when viewed by an officer familiar with drug trafficking, was one of those containers that announced its contents by virtue of its distinctive outward appearance. The court below, however, focused only on the opacity of the plastic balloon, and having given no weight to the officer's special knowledge in this area, arrived at what amounts to a per se rule prohibiting the warrantless seizure of any opaque container.

The State of Texas submits that had the court below applied the probable cause standard and had it given weight to the deductions drawn by the experienced officer when he saw this distinctively-tied balloon, then it would have concluded that the warrantless seizure of the balloon was reasonable under the Fourth Amendment.

ARGUMENT

The seizure of the tied-off balloon at issue was proper under the "plain view" exception to the warrant requirement, as that exception was defined in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The requirements of a warrantless plain view seizure are set out in a plurality opinion authored by Justice Stewart in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Those requirements are: (1) that the officer be in a position to view the object and make the ensuing seizure because of a prior valid intrusion into an area in which the individual had a reasonable expectation of privacy; (2) that the discovery of the item ultimately seized be inadvertent; and (3) that it be "immediately apparent" to the officer that the item is subject to seizure. 403 U.S. at 466.

The rationale is that the prior *lawful* intrusion by the officer, whether it be based on the execution of a warrant or on some recognized exception to the warrant requirement, dispenses with the otherwise-required need for a magistrate to review the necessity for the initial intrusion. Also, the limitation of the plain view seizure to items concerning which the right to seize is "immediately apparent" is sufficient to keep the police from engaging in a general exploratory search, since a search normally would have to be authorized by a warrant particularly describing the things to be searched for and seized. 403 U.S. at 466-67. Once the police have thereby inadvertently come upon such a seizable item, ". . . it would often be a needless inconvenience, and sometimes dangerous — to the evidence or to the police themselves — to require them to ignore it until they have obtained a warrant particularly describing it." 403 U.S. at 468.

In this case there appears to be no dispute that requirements one and two were met. The "prior valid intrusion" and the "inadvertent discovery" will therefore be discussed only briefly. The real issue in this case is whether the sight of the tied-off balloon made it "immediately apparent" to Officer Maples that he was viewing a seizable container of contraband

drugs. Reduced to its bare legal essentials, the question concerns what degree of certainty is required on the part of the seizing officer for the "immediately apparent" requirement to be met and what factors the officer may rely on in meeting that requirement.

A. The stop of Respondent's vehicle during a routine, fixed-location driver's license checkpoint operation constituted a prior valid intrusion under the plain view doctrine.

The testimony is undisputed in this case that Officer Maples and other members of the Fort Worth Police Department were conducting a routine driver's license check at the time Officer Maples encountered Respondent. The checkpoint was conducted at a fixed location on East Allen Street in Fort Worth and had been in operation some 15 minutes when Brown's vehicle came through the checkpoint. (J.A. 9-10, 20). The officers were stopping every vehicle that came through the location. (J.A. 9). They were not looking for narcotics violations or for people with outstanding warrants, (J.A. 9, 12), but were only checking for unlicensed drivers, vehicle inspection violations, and auto registration violations. (J.A. 9).

This is precisely the kind of "roadblock-type" license check, in which all on-coming vehicles are stopped, that this Court mentioned with approval in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). In addition, the Court of Criminal Appeals stated that it had no reason to question the validity of the initial stop of Respondent's vehicle in conjunction with the license check. 617 S.W.2d at 200. (J.A. 47).

Coolidge envisioned the prior valid intrusion as normally stemming from an arrest or from a search, which would themselves have been rendered lawful by either a warrant or the existence of facts giving rise to an exception to the warrant requirement. However, the Court realized that other circumstances could legitimately place the officer in a position to observe and seize the item. It referred to such circumstances as ". . . some other legitimate reason for being present uncon-

nected with a search directed against the accused. . .," 403 U.S. at 466, and as ". . . an extraneous valid reason for the officer's presence." 403 U.S. at 467. In light of *Delaware v. Prouse*, the license check constitutes the valid reason for the initial intrusion into Respondent's freedom to travel the public roadways in his automobile. It was that stop that enabled Officer Maples to see, and later to seize, the tied-off balloon.

B. The officer's discovery of the tied-off balloon was inadvertent.

Justice Stewart's opinion in *Coolidge* also stated that a plain view seizure could not be justified unless the officer inadvertently came across the item seized, on the theory that an anticipated "plain view" seizure would amount to an intentional evasion of the warrant requirement. Opinions concurring in part and dissenting in part questioned the inadvertence requirement. 403 U.S. at 505-510 (Black, J., concurring and dissenting), and 403 U.S. at 513-22 (White, J., concurring and dissenting). *See also*, Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 243-47 (1971). This, coupled with what was seen as a somewhat enigmatic concurring opinion by Justice Harlan, 403 U.S. at 490-93, has caused some to question whether a majority of this Court has agreed that inadvertence is a prerequisite to a plain view seizure. *North v. Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305 (1972). Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1048-49 (1975).

However, that question, assuming it is still an unsettled one, need not be resolved here since there again is no disagreement in this case concerning the inadvertent nature of the discovery of the balloon.[5] As noted, the officers at the license check had not been directed to check for narcotics violations, nor were they looking for any specific persons. (J.A. 9, 12). Officer Maples had never seen Respondent until

[5]In addition, passages in Justice Stewart's opinion indicate that the inadvertence requirement might not apply if, as in this case, the items seized were "contraband or stolen goods or objects dangerous in themselves." 403 U.S. at 471-72.

he drove up to the license check, and he did not know who Brown was. (J.A. 12, 22). Officer Maples saw the tied-off balloon only because Respondent brought it out of his pants pocket while looking for a driver's license. (J.A. 14-15).

This was clearly an inadvertent discovery of the balloon, and neither the Texas court nor Respondent have contended otherwise.

C. The fact that the tied-off balloon contained contraband drugs was immediately apparent to the officer, given his professional experiences with the illicit narcotics trade and in light of the circumstances surrounding the exhibition of the balloon.

The central issue in this case concerns the degree of certainty a police officer must possess regarding the nature of an item observed by him before it can be said that the seizable nature of that item was "immediately apparent" to the officer. The Texas court focused on the opaque quality of the balloon and on whether the officer could therefore have "known" what was stored inside. 617 S.W.2d at 200. (J.A. 48). In so doing it in essence required a showing of knowledge or virtually absolute certainty and effectively established a per se rule of no knowledge where an opaque container is involved. The State of Texas takes the position, as did the dissenters below, that the relevant standard is "probable cause" and that the opacity of the container is only one factor to be considered when assessing the existence of probable cause.

1. "Probable cause" is the standard to be applied in determining whether the seizable nature of an item was "immediately apparent" to the officer observing that item in plain view.

Coolidge did not permit an officer to make a plain view seizure unless it was "immediately apparent" that the item was subject to seizure, 403 U.S. at 466, but the opinion did not spell out the exact meaning of that phrase. Though this Court has not, until now, been called on to address this question explicitly, statements in several of its opinions strongly sup-

port the view that probable cause is the standard embodied in the phrase "immediately apparent."[6]

In *Warden v. Hayden*, 387 U.S. 294 (1967), the Court dealt with a "hot pursuit" situation in which, during a permissible search for weapons, the police came across and seized items of clothing which were evidence of the crime. Though not cast explicitly in such terms by the Court, this was in effect a plain view seizure of the clothing. In addressing the justification for the officer's conclusion that the clothing was subject to seizure, the Court stated:

> The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus — automatically provided in the case of fruits, instrumentalities or contraband — between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.

387 U.S. at 306-07. Taken in context, "nexus" and "probable cause" appear to refer to the same concept. And while the phrase "probable cause" is used in connection with the seizure of "mere evidence," there appears to be little reason to think that a different standard would apply to seizures of "fruits, instrumentalities, and contraband," especially since *Warden v. Hayden* abolishes the distinction between those two classes of items.

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[6] In *Stanley v. Georgia*, 394 U.S. 557, 569-72 (1969) (Stewart, J., concurring), the three Justices who reached the merits of the Fourth Amendment question felt that the obscene nature of movie film could not have been immediately apparent since the officers had to use a projector to view the film before determining that it was obscene. No precise standard for "immediate apparency" was set out, however. Two dissents to denials of certiorari have also questioned whether the seizable nature of items was immediately apparent to the officers, but again no exact statement of the applicable standard was given. *Sedillo v. United States*, 419 U.S. 947 (1974) (Douglas, J., dissenting); *Gentile v. United States*, 419 U.S. 979, 980 n.1 (1974) (Douglas, J., dissenting).

The dissenters in the Texas court pointed to dicta in *Payton v. New York*, 445 U.S. 573, 586 (1980), where it was said that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." In the *Payton* opinion the Court had referred to seizures in public places, but the statement appears to be of general applicability since the plain view doctrine does not make such distinctions concerning the site of the seizure once the "prior valid intrusion" requirement is satisfied.[7]

Finally, in a recent per curiam opinion this Court upheld the seizure of certain items which were observed in plain view inside an automobile which had been lawfully stopped for a speeding violation. The items matched the description of property taken in a recent theft. The Court said that since ". . . there was probable cause 'that the contents of the automobile offend against the law,' [citation omitted], the warrantless seizure was permissible." *Colorado v. Bannister*, 449 U.S. 1, 3 (1980).[8]

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[7]Depending on the circumstances, the seizure of an item observed in a public place might be characterized as a seizure under the "open fields doctrine" rather than under the "plain view doctrine," though the two doctrines are closely related. Under either doctrine the officer would have to be lawfully in a position to observe and physically take possession of the property, but under the open fields doctrine the initial observation does not stem from an "intrusion" in the constitutional sense. There the officer's presence is constitutionally lawful *ab initio*, as opposed to being lawful because of some legal theory, such as possession of a warrant, which validates an otherwise improper intrusion into an area where a person has a reasonable expectation of privacy. *See Hester v. United States*, 265 U.S. 57 (1924); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). For example, an officer might be walking his beat in a public park and observe individuals sitting at a park bench adjacent to the path with tied-off balloons placed between them on the bench. If the officer seizes the balloons, the seizure itself is the only "intrusion" because the officer had as much right to be walking along the path as any other citizen and therefore intruded on no one's rights by being in a position to view and seize the balloons on the bench.

[8]The Court's textual treatment of the issue presented in *Colorado v. Bannister* generally proceeds along the lines of the plain view doctrine, such as by emphasizing the legitimacy of the traffic stop, the inadvertent discovery of the stolen property, and the "plain view" of that property in the car. However, the opinion does not refer to *Coolidge v. New Hampshire*, but cites automobile "search" cases.

To equate "immediately apparent" with "probable cause" would be consistent with the rationale of the plain view doctrine. As noted previously, it is the need for a warrant that is dispensed with when the three requirements of the plain view doctrine are satisifed. But a search warrant, which authorizes both a search *and* a seizure, must itself be based on a showing of probable cause, as expressly required by the Fourth Amendment. Though the exigencies of the plain view situation excuse the officer from applying for a warrant prior to making the seizure, the implication would be that the requirement of probable cause remains. Otherwise the officer would be entitled to make a warrantless seizure on a set of facts which would be insufficient to authorize both a search and a seizure if the same facts were presented to a magistrate, a result which would be rather anomalous.

Use of a probable cause standard is also consistent with the fact that the seizure which results when the plain view doctrine is invoked is of relatively permanent duration. The item seized is not likely to be returned to the owner at all, or at least not for a very long time, if the officer's beliefs turn out to be correct. Since Respondent's balloon did in fact contain heroin, he will never be getting it back. This is important because, although the Court has allowed certain seizures or detentions on less than probable cause, such action has been authorized because the seizure was of rather short duration and was a relatively minor intrusion when compared to the societal interests served by the seizure. *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) ("stop and frisk" for weapons in order to protect officer where articulable basis for suspicion exists); *United States v. Cortez*, 449 U.S. 411 (1981) ("border stop" based on particularized suspicion); *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (29-hour detention of unopened first-class mail was reasonable in order to permit agents time to investigate and apply for search warrant). Therefore if a temporary or investigatory seizure is permissible on a showing which is less strict than probable cause, the permanent seizure of items presumably would call for the more stringent standard.

By the same token, the rationale underlying the plain view doctrine would not justify holding the officer to a standard in excess of probable cause. Again, if the exigencies of the plain view situation reasonably relieve the officer of the inconvenience of applying for a warrant (with the associated risk that evidence is lost in the interim), then there is no reason to hold him to a higher standard of certainty than would be required if he were to seek a warrant. *United States v. Chesher*, 678 F.2d 1353, 1357 (9th Cir. 1982). Presumably the benefit associated with a higher standard is that the police will seize fewer items which they ultimately determine they did not need to seize, and therefore the individual's possession of the item is not interrupted for whatever short period of time is needed to ascertain that the items were actually not incriminatory or of evidentiary value.

Yet requiring a degree of certainty in excess of probable cause would involve articulating a standard that apparently has not been previously applied by this Court in the search and seizure area and which finds no support in the language of the Fourth Amendment itself. Higher standards of certainty, such as proof beyond a reasonable doubt, clear and convincing evidence, or even preponderance of the evidence, all deal with standards of proof which are applicable to factual determinations made in court proceedings. *See generally, Brinegar v. United States*, 338 U.S. 160, 174-76 & nn.12, 13 (1949) (and defining probable cause to exist where "'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed"). Although the difference between what is "certain," and therefore a fact, and what is merely probable is always a matter of degree when fallible humans must make that determination, it seems that the quest for certainty, if it can be achieved at all, is a matter for determination in the adversarial proceedings in the trial courts. The officer who must make decisions in the field, or the magistrate who makes an ex parte review of the officer's findings, can reasonably be held only to a standard of probable cause. The marginal benefits of imposing a

higher standard on the officer in the plain view area would be small, especially given the difficulty of phrasing a new standard. It is difficult enough now to distinguish between mere suspicion, reasonable suspicion, and probable cause. To slice the pie even thinner would no doubt increase the problems for the officer in the field and for the courts who must review the propriety of his actions. Therefore we submit that probable cause is the appropriate standard for determining if seizable items were immediately apparent to the officer.[9]

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[9]The majority of jurisdictions addressing this matter have reached the conclusion that probable cause is the standard to be applied in the plain view area. *E.g., United States v. Ochs*, 595 F.2d 1247 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979); *United States v. Duckett*, 583 F.2d 1309 (5th Cir. 1978); *United States v. Gray*, 484 F.2d 352 (6th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974); *United States v. Golay*, 502 F.2d 182 (8th Cir. 1974); *United States v. Chesher*, 678 F.2d 1353 (9th Cir. 1982); *United States v. Thomas*, 16 U.S.C.M.A. 306, 36 C.M.R. 462 (1966); *Shipman v. State*, 291 Ala. 484, 282 So.2d 700 (1973); *Reeves v. State*, 599 P.2d 727 (Alaska 1979); *People v. LaRocco*, 178 Col. 196, 496 P.2d 314 (1972); *Price v. United States*, 429 A.2d 514 (D.C.Ct.App. 1981); *State v. Harwood*, 94 Idaho 615, 495 P.2d 160 (1972); *State v. Turner*, 210 Kan. 836, 504 P.2d 168 (1972); *State v. Jackson*, 263 La. 849, 269 So.2d 465 (1972); *State v. Wilson*, 279 Md. 189, 367 A.2d 1223 (1977); *People v. Trudeau*, 385 Mich. 276, 187 N.W.2d 890 (1971); *People v. Alexander*, 37 N.Y.2d 202, 333 N.E.2d 157 (1975); *Wright v. State*, 88 Nev. 460, 499 P.2d 1216 (1972); *State v. Williams*, 55 Oh.St.2d 82, 377 N.E.2d 1013 (1978); *State v. Joseph*, 114 R.I. 596, 337 A.2d 523 (1975); *Armour v. Totty*, 486 S.W.2d 537 (Tenn. 1972); *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980); *Bies v. State*, 76 Wis.2d 457, 251 N.W.2d 461 (1977). Some courts have stated the test as "reasonable grounds to believe," which appears to be the same as probable cause. *Guidi v. Superior Court*, 10 Cal.3d 1, 513 P.2d 908 (1973); *State v. Elkins*, 245 Ore. 279, 422 P.2d 250 (1966).

The commentators also appear to agree on a probable cause standard. 2 W. LaFave, Search And Seizure §§4.11(b), 5.2(j), 6.7(a) (1978); Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 Mercer L. Rev. 1047, 1085-88 (1975); Comment, *"Plain View"—Anything But Plain: Coolidge Divides the Lower Courts*, 7 Loyola of L.A. L. Rev. 489, 502-07 (1974); Kuipers, *Suspicious Objects, Probable Cause, and the Law of Search and Seizure*, 21 Drake L. Rev. 252 (1972).

Even courts applying some standard greater than probable cause have not required certainty on the part of the seizing officer. *See, e.g., United States v. Smollar*, 357 F.Supp. 628 (S.D.N.Y. 1972) ("strong reason to believe" standard). The Fifth Circuit summarily rejected a certainty standard, noting that an officer "of course" could not be certain of what he was seizing. *United States v. Drew*, 451 F.2d 230, 233 (5th Cir. 1971) (outline of pistol visible in plastic folder).

2. In determining whether an officer had probable cause to seize an object, the courts can and should consider not only the objective facts observed by the officer, but also the inferences he was then able to draw based on his professional training and experience.

As the summary of the evidence makes clear, Officer Maples gave considerable testimony concerning why he thought the tied-off balloon contained narcotics. His own participation in narcotics arrests, as well as his discussions with other officers, had made him aware that such balloons were frequently used to store illegal drugs. (J.A. 14-15). The powder and vials in the glove box further aroused his suspicions because of his experiences with narcotics enforcement, which had included talks with drug users. (J.A. 17, 30). The police chemist confirmed that it was common to analyze substances contained in tied-off balloons and to find that the substance was a controlled drug. (J.A. 40). Perhaps the most telling evidence of the significance of a tied-off balloon to a trained officer was the manner in which Officer Maples advised his partner of what had happened: ". . . I showed him what I had [the balloon] and I didn't have to say anything. He realized the situation then." (J.A. 18-19).

The court below, however, gave no legal significance to these matters, and in fact simply ignored them.[10] Instead, it mentioned only the fact that Officer Maples had never personally made an arrest involving the type of vials seen in the glove box, 617 S.W.2d at 200, (J.A. 47), which was taken somewhat out of context since the officer testified that his general law enforcement experience did make him suspicious when he saw the vials. (J.A. 17). As the dissenters pointed out, this amounted to a determination that an officer's experience and training can form no basis for justifying a plain

[10]This Court ". . . will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental — i.e., constitutional — criteria established by this Court have been respected." *Ker v. California*, 374 U.S. 23, 34 (1963).

view seizure. 617 S.W.2d at 203 n.4 (McCormick, J., dissenting). (J.A. 54).

That the law does accord significance to the inferences or deductions an officer can draw as a result of his training and experience is hardly a novel proposition. Only recently this Court, when evaluating a border stop, noted ". . . the imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person — and for action on that suspicion." *United States v. Cortez*, 449 U.S. 411, 419 (1981).[11]

This Court has adverted to the significance of the officer's training and experience in many other situations as well. For example, in *Johnson v. United States*, 333 U.S. 10, 13 (1948), the Court said in dicta that the distinctive odor of burning opium, when detected by a knowledgeable officer, could be "most persuasive" regarding probable cause for the issuance of a search warrant. And in *Robbins v. California*, 453 U.S. 420 (1981),[12] the Court, again in dicta, indicated that California could have justified the seizure of plastic-wrapped bricks of marijuana had the prosecution made a better record on the significance of such packages to the experienced officer. *See also, Ker v. California*, 374 U.S. 23 (1963) (seizure of a brick-shaped package in plain view, which officer "recognized as marijuana," valid as incident to arrest); *Hester v. United States*, 265 U.S. 57 (1924) (expertise of revenue officers enabled them to realize that liquid-filled jugs and bottles contained moonshine whiskey).

Though none of the above cases explicitly addressed the problem in terms of "plain view" analysis, lower courts not

[11] *Accord: United States v. Ortiz*, 422 U.S. 891, 897 (1975) ("officers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience with aliens and smugglers"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("the officer is entitled to assess the facts in light of his experience detecting illegal entry and smuggling").

[12] See note 13, *infra*.

surprisingly have given weight to the deductions drawn by the officer when he observed and seized an object in plain view. *E.g., United States v. Chesher*, 678 F.2d 1353, 1355 (9th Cir. 1982) (officer associated smell of acetone with manufacture of methamphetamine); *People v. Lilienthal*, 22 Cal.3d 891, 587 P.2d 706, 709 (1978) (officer associated distinctively folded paper bindle with storage of heroin and cocaine); *Price v. United States*, 429 A.2d 514, 517 (D.C. Ct. App. 1981) (officer associated coin envelope with marijuana packaging); *People v. Alexander*, 37 N.Y.2d 202, 333 N.E.2d 157 (1975) (officer associated glassine envelope with heroin packaging).

The reason the law accords weight to the officer's experience and training is obvious. Specialization expands society's available knowledge, and we encourage and rely on specialization in law enforcement just as we do in any other field of human endeavor. As Professor LaFave has said, "[t]here would be little merit in securing able, trained men to guard the public peace if their actions were to be measured by what might be probable cause to an untrained civilian." 1 W. LAFAVE, SEARCH AND SEIZURE, §3.2(c), p. 462 (1978). The Court of Appeals for the District of Columbia Circuit has stated the issue well:

> An officer experienced in the narcotics traffic may find probable cause in the smell of drugs and the appearance of paraphernalia which to the lay eye is without significance. His action is not measured by what might be probable cause to an untrained civilian passerby. When a peace officer makes the arrest the standard means a reasonable, cautious and prudent peace officer. The question is what constituted probable cause in the eyes of a reasonable, cautious and prudent peace officer under the circumstances of the moment.
>
> The problem faced by the officer is one of probabilities —not certainties and not necessarily eventual truth.

Bell v. United States, 254 F.2d 82, 86 (D.C. Cir. 1958) (and alluding to *Brinegar v. United States*, 338 U.S. 160 (1949)).

The Texas court therefore fell into serious error in failing to give weight to the inferences Officer Maples drew when he observed the tied-off balloon.

3. A tied-off balloon is the type of distinctive package or container that may be seized without a warrant because it announces by its outward appearance that its contents are illegal drugs.

In *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *Robbins v. California*, 453 U.S. 420 (1981),[13] this Court established that as a general rule the police cannot "search" inside a container without first obtaining a warrant. The formal holdings of these cases are not directly relevant here because in a plain view case the actual observation of the item is not a "search" at all in the constitutional sense, *United States v. Lee*, 274 U.S. 559 (1927); *Ker v. California*, 374 U.S. 23, 43 (1963); therefore what occurs in the true plain view case is a "seizure" only. (In addition, in this case Respondent objected only to the seizure of the balloon, and not to the opening of the balloon at a later time by the police chemist.)

However, there is highly relevant dicta in both *Arkansas v. Sanders* and *Robbins v. California* concerning exceptions to the warrant requirement for a container search and seizure. This can best be explained by examining the passage in *Robbins v. California*, 453 U.S. at 427, which first quotes the statement of the exceptions, which are found in footnote 13 of *Arkansas v. Sanders*, and then explains the meaning of these exceptions:

> . . . footnote 13 of the *Sanders* opinion says that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the

[13] *Robbins* is in effect overruled on its facts by *United States v. Ross*, 102 S.Ct. 2157 (1982), so that when an officer has probable cause to believe that contraband is located somewhere in a vehicle, he may, without a warrant, look for that contraband inside any containers that he encounters in the car during the course of his search if the contraband might reasonably be located in that container.

> Fourth Amendment." 442 U.S. 753, at 764-765, 99 S.Ct. 2586, 2593, 61 L.Ed.2d 235. But the exceptions listed in the succeeding sentences of the footnote are the very model of exceptions which prove the rule: "Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." The second of these exceptions obviously refers to items in a container that is not closed. The first exception is likewise little more than another variation of the "plain view" exception, since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true, of course, if the container were transparent, or otherwise clearly revealed its contents.

Regarding the second exception concerning the container which "announces its contents," *Robbins* further said:

> Expectations of privacy are established by general social norms, and to fall within the second exception of the footnote in question a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer.

453 U.S. at 428.[14]

As the statements in the first excerpt imply, both of these exceptions to the warrant requirement are but restatements of the plain view doctrine. If there is no need to "search" the container in order to ascertain its contents, then the only event of constitutional significance which takes place is the

[14] In *Henry v. United States*, 361 U.S. 98, 104 (1959), which addressed probable cause to arrest, the Court said that a package might be shown to contain contraband because of its shape, design, weight, or the manner in which it was carried.

seizure. Since the *Sanders* footnote assumes the officer has come across the container during a lawful search, it is obvious that the Court is talking about plain view seizures. Whether the configuration, transparency, or other attribute of the container announces the contents to an observer is but a particularized statement, in the "container" area, of the requirement that the seizable nature of the item be immediately apparent — i.e., that probable cause for the seizure be present. Factors such as the size, shape, transparency, or opacity of the container are simply factors to be weighed in the probable cause determination.

This Court has upheld seizures based on the factors just mentioned, though none of the seizures were explicitly analyzed in terms of the plain view doctrine. Applying the open fields doctrine, the Court upheld the seizure of liquid-filled jugs and bottles which were recognized by experienced revenue officers as containers of moonshine whiskey. *Hester v. United States*, 265 U.S. 57 (1924). In *Ker v. California*, 374 U.S. 23 (1963), the Court approved the seizure, during the course of an arrest, of a plastic-wrapped brick which the officer recognized as marijuana. *Ker* would appear to be an example of a true plain view seizure. And in *United States v. Ross*, 102 S.Ct. 2157, 2169 & n.23 (1982), the Court noted that in *Husty v. United States*, 282 U.S. 694 (1931), the officers properly seized what were called "whiskey bags," which the officers apparently recognized as containers for liquor bottles.[15] *Husty* is not a true plain view case because liquor is exactly what the officers were looking for when they made their search of the car. However, the officers would presumably have needed probable cause to believe that the item they found was in fact what they were looking for and what they had a right to seize. The concept of probable cause is the same, whatever might be the theory authorizing the search or seizure in a particular case.

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[15]We cite to *Ross* because these facts are not apparent from a reading of the *Husty* opinion itself.

Numerous state and federal courts have upheld seizures of what might be characterized as "distinctive narcotics packages."[16] Normally it is the police officer's special knowledge of the narcotics trade that enables him to recognize the significance of the container.

The Supreme Court of California decided a case strikingly similar to the one before the Court, except that the drug was cocaine and the package was a "paper bindle." *People v. Lilienthal*, 22 Cal.3d 801, 150 Cal.Rptr. 910, 587 P.2d 706 (1978). As the accused was looking for his driver's license after being stopped for a traffic violation, a distinctively folded square of paper fell from his wallet, which he then tried to cover with his foot. The officer seized the bindle because he had made numerous arrests where heroin and cocaine had been packaged in such distinctively-folded packets. The California court upheld the seizure, noting that reasonable grounds for believing that a package contains contraband may be afforded by the package's shape, design, and the manner in which it is carried.

In *People v. Montoya*, 185 Col. 299, 524 P.2d 76 (1974), state officers stopped a vehicle driven by an individual who had just exited a house as the officers were approaching it to execute a search warrant. As one officer neared the car he saw that the defendant had his hand jammed between the seat and seat back. As the defendant withdrew his hand, the officer observed several balloons pop out of the seat crevice and into view. Believing from his experience that the balloons contained heroin, the officer seized them. The Colorado Supreme Court held this to be a valid plain view seizure. Likewise, the Ninth Circuit has upheld the seizure of heroin-filled condoms seen in a motel room at the time of a narcotics arrest, the

[16]The Texas Controlled Substances Act now has a provision defining as drug paraphernalia a "balloon . . . used or intended for use in packaging small quantities of a controlled substance." Art. 4476-15, §1.02(29)(I), TEX. REV. CIV. STAT. ANN. (Vernon Supp. 1982) (effective September 1, 1981). Similar provisions exist in the Model Drug Paraphernalia Act. See *Mid-Atlantic Accessories Trade Assoc. v. Maryland*, 500 F. Supp. 834 (D.Md. 1980).

officer having testified that balloons, finger stubs, and condoms were known to him to be common methods of packaging heroin. *Ponce v. Craven*, 409 F.2d 621 (9th Cir. 1969).

The New York Court of Appeals has said that a glassine envelope is a "telltale sign of heroin," and that the observation of such packages by a knowledgeable officer, coupled with such actions as disposal of the items on the officer's approach, provides probable cause for the seizure of such envelopes. *People v. Alexander*, 37 N.Y.2d 202, 371 N.Y.S.2d 876, 877, 333 N.E.2d 157 (1975). The same court also recognized that the passing of a glassine envelope in public is the "hallmark" of an illicit drug transaction which all but constitutes per se probable cause to arrest. *People v. McRay*, 51 N.Y.2d 594, 416 N.E.2d 1015 (1980). Indeed, the Court of Criminal Appeals of Texas held several months after the instant case was decided that an experienced officer's observation that a tinfoil packet was exchanged for money gave the officer probable cause to make a warrantless *arrest* for a narcotics offense being committed in his presence. *Boyd v. State*, 621 S.W.2d 616 (Tex. Crim. App. 1981). That such similar facts resulted in different outcomes on appeal demonstrates how seriously in error the court below was when it concluded that a plain view *seizure* must be based on a standard of certainty in excess of probable cause.

What the above cases have in common is that the containers involved were characteristically, and almost singularly, associated with illegal narcotics trafficking—a fact which is known to the seizing officer because of his professional experiences in combatting such criminal activity. Preceding sections of this brief establish beyond doubt that the officer's expertise can be considered in evaluating whether a particular item appeared to the officer to be subject to warrantless seizure. This Court's own opinions make clear that such things as the size, shape, design, configuration, transparency, and manner of carriage of a package may be used in evaluating its probable contents. Yet the court below focused solely on the opacity of the container and completely disregarded the officer's special knowl-

edge regarding the usage of a tied-off balloon. Its approach was erroneous.

We might add that we do not suggest that the phrase "distinctive narcotics package" has any mystical qualities. The central issue is simply whether probable cause concerning the item is established, and the factors which might make a certain container distinctive to the police are simply those which would be weighed anytime probable cause is an issue. Some containers may be distinctive under almost any circumstances; others will be distinctive only because of the peculiar facts of a particular case. As the dissent below noted, these factors are supporting matters and not controlling issues. 617 S.W.2d at 201 n.1. (McCormick, J., dissenting). Yet as the dissent also noted, ". . . some objects may be so closely associated with criminal activity as to support the probable cause element by themselves." *Id.* If any such objects do exist, then the State of Texas would suggest that a tied-off balloon used for narcotics storage is certainly one of them.

D. The officer therefore had probable cause to believe that the balloon was subject to seizure, and exigent circumstances justifed a warrantless seizure.

For all the reasons previously stated, we submit that Officer Maples had ample probable cause to believe that the balloon contained narcotics. From his professional experiences he knew that such balloons were used to store narcotics, and he had seen in the glove box other items associated with illicit drug use. The balloon itself was brought into and out of view in a suspicious manner.

Much of the defensive effort at the hearing was aimed at showing that Officer Maples was not "certain" of the contents of the balloon and that the balloon could have contained any number of items. As shown already, certainty is not the standard to which Officer Maples is held. Only laboratory analysis could establish with certainty what was in the balloon. See *United States v. Robinson*, 414 U.S. 218, 223 (1973) (validating seizure during arrest of capsules which officer thought to

be, and which later analysis proved to be, heroin). And what the balloon "could" have held is essentially irrelevant; what there was probable cause to believe it held is the determinative factor. While one might conjure up examples of many items small enough to be placed inside a balloon, it is well nigh impossible to think of anything, other than narcotics, that is actually stored in such a manner in everyday life. As one intermediate court observed, the only things one could realistically expect to find in a balloon, other than narcotics, are air, helium, or water — none of which it was thought would carry any incremental reasonable expectation of privacy. *People v. Jenkins*, 106 Cal.App.3d 731, 165 Cal.Rptr. 361, 367 (Ct.App. 1980). The only other real possibility that suggests itself to the State is a balloon filled with non-narcotic powder which is intended to be used in a drug "rip-off," which might explain the purpose of the other balloon found in Respondent's possession. This is an example of the exception that proves the rule. One would not put an innocuous powder in a balloon for purposes of passing it off as narcotics unless the recipient would be expecting to find genuine narcotics in such a receptacle.

Officer Maples also was faced with exigent circumstances which justified the seizure of the balloon without a warrant. The State mentions exigent circumstances separately at this point only because *Coolidge* does note that plain view alone will not justify a warrantless seizure; exigent circumstances must also be present. 403 U.S. at 468. However, the State does not believe that the presence of exigent circumstances is an additional fourth requisite of a plain view seizure. Rather exigent circumstances in this context is a shorthand statement of what is established as a matter of law once the prior valid intrusion, inadvertent discovery, and immediate apparency requirements have been met. Given the rationale for the plain view doctrine, it is the existence of these three factors that renders the circumstances exigent and dispenses with the need for a warrant. "As the reason for the stop was wholly unconnected with the reason for the subsequent seizure, it would be especially unreasonable to require a detour to a mag-

istrate before the unanticipated evidence could be lawfully seized." *Colorado v. Bannister*, 449 U.S. at 3 n.2.

If there were any additional showing of exigent circumstances that had to be made, the test was certainly met here. The balloon itself was a small, portable item that could have readily been moved, concealed, or destroyed by Respondent. The need for immediate action was increased because Respondent and the balloon were inside a vehicle, which itself is inherently moveable. *Chambers v. Maroney*, 399 U.S. 42 (1970). The immediate seizure was fully justified. The Court of Criminal Appeals erred in concluding that the seizure was unlawful.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed.

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No. 81-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF TEXAS,

Petitioner,

v.

CLIFFORD JAMES BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals decided this case on the basis of applicable Texas law and/or the search and seizure provision of the Texas Constitution or on the basis of the Fourth Amendment of the United States Constitution.

2. If the Texas Court of Criminal Appeals decided this case on the basis of the United States Constitution, did the mere sight by a police officer of a tied-off child's balloon rise to the level of knowledge needed to make it immediately apparent to the police officer that the balloon was contraband he was authorized to seize.

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CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

CONSTITUTION OF THE STATE OF TEXAS. 1876

Article I, Section 9
Searches and Seizures

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

TEXAS CODE OF CRIMINAL PROCEDURE

Article 1.06
Searches and Seizures

The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation.

TEXAS CODE OF CRIMINAL PROCEDURE

Article 38.23
Evidence Not to be Used

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the

United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This cause involves the arrest of an individual, Clifford James Brown, by officers of the Fort Worth, Texas Police Department on a charge of "investigation illegal possession of a controlled substance". The arrest resulted from the officer's seizure of a balloon, later shown to contain heroin, from the Defendant's car when it was stopped at a driver's license checkpoint. The Defendant was tried in the 213th Judicial District Court of Tarrant County, Texas for the offense of possession of heroin (Tex. Rev. Civ. Stat. Ann., Art. 4476-15, Paragraph 4.02[b][2][K] and 4.04[a-b]).

Prior to the trial, the Defendant filed a motion to suppress evidence that had been seized by the police at the time of the incident. A hearing on that motion to suppress was held and the motion overruled (J.A. 3-4). The Court then accepted the Defendant's plea of nolo contendere and, in accordance with a plea agreement, sentenced the Defendant to a term of four years confinement in the Texas Department of Corrections.

The Defendant appealed the Court's ruling with regard to his motion to suppress and the Texas Court of Criminal Appeals reversed the conviction. The Criminal District Attorney for Tarrant County, Texas petitioned this Court for a Writ of Certiorari which was granted on June 14, 1982.

The evidence at the hearing on the Defendant's motion to suppress showed the following:

I. Events Leading to the Incident

At about 10:00 P.M. on June 18, 1979, five officers of the patrol division and one supervising sergeant, all of the Fort Worth Police Department, set up a driver's license checkpoint in the 1400 block of East Rosedale Avenue in Fort Worth, Texas (J.A. 6-8). The officers stopped every car and checked for traffic violations such as proper license plates, inspection stickers and drivers not having operators' licenses (J.A. 9).

The State's only witness, Harold Tom Maples, testified that he was one of the five officers conducting the license checkpoint that night. He further stated that neither had anyone told them to check for narcotics nor did they have a list of known narcotics users. No narcotics officers were present (J.A. 9, 12).

After approximately forty-five minutes to one hour, all of

the officers and the sergeant changed their location to the 1200 block of East Allen Street (J.A. 9, 10). There they set up the driver's license checkpoint, but did it in a different way. By this, it appears the officer meant that they did not use flares to direct the cars to the checkpoint, but the record is unclear as to the extent the second operation was conducted in a manner different from the first (J.A. 10). There is, for example, no evidence that the officers stopped and checked each on-coming car while at the East Allen Street location as they had at the earlier checkpoint.

II. The Incident

The East Allen Street checkpoint had been established for about fifteen minutes when Officer Maples stopped a 1970, brown, four-door Buick automobile driven by the Defendant (J.A. 12, 20). Officer Maples said he did not know the Defendant or had he ever seen him before (J.A. 12). Officer Maples asked the Defendant for his driver's license and the Defendant put his right hand in his pants' pocket (J.A. 13). The officer became "worried" when the Defendant kept his hand in his pocket for too long and so the officer shined his flashlight at the Defendant's hand (J.A. 13). The Defendant pulled his hand partially out of his pocket allowing the officer to see a partially folded dollar bill in his hand and a small green balloon stuck between the Defendant's two middle fingers (J.A. 13-15). The balloon dropped to the Defendant's right leg and the Defendant reached over and began to rummage in the glove compartment (J.A. 16).

In the glove compartment the officer saw some small plastic vials, white powder and a bag of children's party balloons. After looking in the glove compartment for about one minute, the Defendant told the officer he did not have a

driver's license. The officer then asked the Defendant to get out and go to the back of the automobile (J.A. 17, 18).

When the Defendant exited the vehicle, the officer shined the light on the seat and saw the green balloon which he retrieved (J.A. 18). Officer Maples showed the balloon to his partner, Officer David Marlow, but Marlow did not say or do anything (J.A. 19). Officer Maples speculated that Marlow "realized the situation" but there is no evidence as to the basis for that conclusion.

The Defendant was asked for identification and gave the officers his correct name and date of birth (J.A. 19). At that time Officer Maples advised the Defendant he was under arrest and made an inventory search of the automobile (J.A. 19). In the glove compartment Officer Maples found the small empty plastic vials, and the package of children's balloons (J.A. 19, 29) he had seen earlier. On the back floorboard the officer found a bottle of "milk sugar" and several baggies containing a substance that appeared to be marijuana (J.A. 19, 20, 29). Officer Maples put all of the evidence in a sack and put the sack in an evidence locker at the Police Department (J.A. 20). Officer Maples alo issued a ticket to the Defendant for failure to have his driver's license with him (J.A. 20).

Officer Maples arrested the Defendant after he had picked up the balloon because he *believed* that there *might* be narcotics in it (J.A. 22, 28). After the initial arrest had been made the officer found what appeared to be marijuana and arrested the Defendant for that offense also (J.A. 22).

Officer Maples' written report of the incident did not mention what controlled substance he suspected the Defendant possessed or could he tell any of the crime lab personnel what was in the balloon (J.A. 25,26). At the scene of the arrest the officer did not open the balloon or taste or smell the contents (J.A. 30). The officer admitted on cross-

examination that the arrest was based on the sight of the green balloon, which, although the officer was not certain of its contents, he *suspected* contained a controlled substance (J.A. 25).

III. The Police Officer

At the time of the incident Officer Harold Maples had been with the police department for approximately four years and eleven months. Neither he nor any of the other officers at the scene had any experience as narcotics officers (J.A. 6, 14). Officer Maples, however, had been involved in several situations where narcotic arrests had been made including ones where the narcotic was in a balloon (J.A. 14, 15). The year before this incident Officer Maples had made an arrest where he had "recovered approximately eight or nine such multi-colored balloons" (J.A. 15). Although Officer Maples does not explicitly say that these eight or nine balloons contained narcotics, such would be a reasonable conclusion based on the context of the statement. Likewise the testimony that Officer Maples had conversations with other police officers concerning "this factor" is not a model of clarity but it would appear to have reference to narcotics being contained in balloons (J.A. 15). Officer Maples testified the sight of the plastic vials in the glove compartment of the Defendant's car had "particular significance" to him (J.A. 17).[1]

IV. Hearing on the Motion to Suppress

At the suppression hearing the Defendant had seven balloons, each a different color, that were marked for

[1]The possession of plastic vials is not an offense, in and of itself, and the mere viewing of such objects does not rise to the level of probable cause that would allow their seizure, *Howard v. State*, 599 S.W.2d 597 (1979).

identification as Defendant's Exhibit B (J.A. 26). These had been tied and looked similar to the balloons seized at the time of the arrest although some of these differed as to size (J.A. 27). Officer Maples testified that by merely looking at the balloons identified as Defendant's Exhibit B, he could not say what they contained (J.A. 26). In fact, he could not tell by visual inspection if the balloons contained a powdery substance or if they were solid rubber (J.A. 26). Officer Maples touched the balloons and agreed that the seven balloons felt similar to the one seized at the time of the arrest, but he was still unable to tell what was in the seven balloons (J.A. 30).

Officer Maples admitted that even then, at the time of the hearing, he did not know what was in the balloon seized from the Defendant at the time of the arrest. As far as he knew the balloon could have contained anything at all including face powder or it could have been solid rubber (J.A. 30, 31).

Mr. Frank Shiller testified that he had been an employee of the Fort Worth Police Department Crime Lab since 1961 and had been its Director since October, 1972 (J.A. 35). During his eighteen years as a forensic scientist, Mr. Shiller had done thousands of drug analyses but even with this experience, he could not identify the contents of the balloons marked for identification as Defendant's Exhibit B and stated he believed no one else could do so without subjecting the contents to a chemical analysis (J.A. 35, 37). Mr. Shiller said that trying to identify the substances in the balloons without such analysis would be mere speculation (J.A. 37).

Mr. Shiller testified that *two* tied-off balloons containing a powdery substance had been submitted to the crime lab as evidence in this cause (J.A. 36, 39). The green balloon, identified as "Item A", was analyzed and determined to contain heroin (J.A. 36). The powder in the second balloon,

identified as "Item D", was subjected to analysis but the testing was halted when the substance was shown to be neither heroin nor cocaine (J.A. 37). Mr. Shiller, with all of his experience, had "no idea" what was in the second balloon (J.A. 41).

V. Review by the Texas Court of Criminal Appeals

The Texas Court of Criminal Appeals did not question either the validity of the initial stop of the Defendant's vehicle or the propriety of his arrest when he failed to produce a driver's license (J.A. 47).[2] Instead that Court focused entirely on the question of the seizure of the green balloon. That Court noted that "plain view *alone* is never enough to justify a warrantless seizure of evidence" (emphasis in the orignal) and cited *Coolidge v. New Hampshire,* 403 U.S. 443, 468, 91 S.Ct. 2022, 2039, 29

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[2]The question of the propriety of the stop of the Defendant's car was not raised by the Defendant in his appeal or was it addressed by the Texas appellate court. Contrary to the briefs of both the State and the Government, the stop could have been contested. The record is clear that at the checkpoint on *East Rosedale Street,* the police systematically stopped every car (J.A. 9). The stopping of every car squares with the suggestion of this Court in *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), that the stopping of all on-coming traffic at a road block type stop was likely to be constitutionally acceptable. Both the State and the Government cite *Prouse* as authority for the stop of the Defendant's car. In the instant case, however, there is no evidence how the roadblock was conducted once it was moved to *East Allen Street* where this incident occurred. In fact the only testimony is that the East Allen Street checkpoint was handled in a manner different from that used on East Rosedale (J.A. 10). Thus there is no evidence that all on-coming cars were stopped on East Rosedale Street and therefore the evidence is contrary to the positions of both the State (State's Brief, page 12) and that of the Government (Government's Brief, page 9).

L.Ed.2d 564 (1971). That Court then went on to discuss its previous holdings in *Duncan v. State,* 549 S.W.2d 730, 732 (1977) dealing with plastic bags as containers for controlled substances; *Nicholas v. State,* 502 S.W.2d 169, 171 (1973) which dealt with the seizure of photographic negatives; *DeLao v. State,* 550 S.W.2d 289, 291 (1977), dealing with a substance inside a red balloon; and finally, *Howard v. State,* 599 S.W.2d 597, 598 (1979), dealing with plastic vials. In its opinion in this instant case, the Texas appellate court noted that in these listed cases, it had held that merely observing each of the named items was insufficient to authorize its seizure and that Court went on to hold in this case that opaque party balloons are to be accorded similar treatment (J.A. 49).

SUMMARY OF THE ARGUMENT

According to the briefs for the State of Texas and for the United States, the question presented in this case is whether "probable cause" is the appropriate standard under the Fourth Amendment to determine whether the evidentiary nature of an item is immediately apparent to a police officer who observes that item in plain view and seizes it. The Defendant agrees that probable cause is the proper measure, under the Fourth Amendment for such actions and under those circumstances. The problem, however, is that this case does not rest upon the Fourth Amendment.

Both Article 1.06 of the Texas Code of Criminal Procedure and Article I, Section 9 of the Constitution of the State of Texas prohibit unreasonable searches and seizures in language that more or less tracks the Fourth Amendment of the United States Constitution. Thus, in Texas there are at least two state provisions and one federal constitutional

provision prohibiting unreasonable searches and seizures. The opinion of the Texas Court of Criminal Appeals is silent with regard to stating any basis for its decision that the seizure of the balloon from the Defendant was impermissible. Other than a brief quotation from the Defendant's original motion to suppress, in which both the Fourth Amendment and the Texas Constitution, Article I, Section 9 are mentioned, there is no reference to the Fourth Amendment or any other provision of the United States Constitution anywhere in the opinion. Similarly, there is no further reference to the State Constitution or the Texas law.

It is a basic principle of constitutiona law that no court will pass on a question of constitutionality unless it is unavoidable. If both a constitutional and a statutory answer to a question both exist and are consistent with each other, all courts will base their action on the statute and avoid the constitutional issue. This premise has long been accepted by the federal courts, *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101 (1944) as well as by the Texas courts. This includes the Texas Court of Criminal Appeals which decided this instant case. See *Taylor v. State,* 358 S.W.2d 124 (1962).

It has long been recognized that interpretation of a state law by that state's court of last resort has always been accepted as controlling by this Court, *Clarke v. Clarke,* 178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028 (1900). It is further well accepted that the states are free to develop their own standards for searches and seizures which are designed to meet their particular needs and to reflect the wishes of their own particular citizens. These will not be disturbed by the federal courts unless the practices or procedures under these state standards fall below the minimum protections of the Fourth Amendment of the United States Constitution,

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). As shown in the instant case, Texas established such standards in their Code of Criminal Procedure (Article 1.06) and since, most certainly, these standards are not less rigorous than those of the Fourth Amendment, these should not be disturbed by this Court.

Thus in the absence of any information to the contrary, it should be presumed that the Texas Court of Criminal Appeals followed its own stated principles and rested its decision in the instant case on Article 1.06 of the Texas Code of Criminal Procedure. Accordingly, the Texas court never reached the constitutional issues here.

In addition, it should be noted that the Texas Constitution, Article I, Section 9, prohibits unreasonable searches and seizures and was available to the Texas Court of Criminal Appeals if that court felt a need for a constitutional basis for its decision in this case. There is no reason to believe the Texas appellate court leap-frogged the Texas Constitution so that it could base its decision on the Fourth Amendment. Article I, Section 9 of the Texas Constitution and the Fourth Amendment of the United States Constitution are the functional equivalents of each other. The fact that there are similar provisions in both the Texas and the United States constitutions does not reduce the Texas Constitutional provision to meaninglessness. There has been nothing to indicate that the Texas Court of Criminal Appeals has abandoned the Texas Constitution and allowed it to become merely a mirror for federal holdings. Cf., *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) and *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975).

The citation by the Texas court of this Court's ruling in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) is not determinitive of anything. The

Texas courts are free to use, as they see fit, the rulings of the federal courts for whatever enlightenment or guidance these may provide. But assuming the state action does not fall below the minimum standards of the federal constitutional protection, the state is free to accept or reject federal holdings and to set for themselves such standards as they deem appropriate.

ARGUMENT

I. The Question in General

The "Question Presented" by the brief for the State of Texas asks:

> Does a police officer run afoul of the Fourth Amendment, merely because he cannot see through the opaque packaging material being used, when he makes a warrantless seizure of a slightly bulging, tied-off balloon which he lawfully observes in plain view, where based on his professional experiences with the illicit narcotics trade, and in the light of the circumstances of the exhibition of the balloon, he has probable cause to believe the balloon contains illegal drugs?

This is similar to the "Question Presented" by the brief of the United States as *Amicus Curiae,* which states:

> Whether the Fourth Amendment permits the warrantless seizure of a tied-off balloon observed by a police officer in plain view during a lawful stop of respondent's car, upon probable cause to believe the balloon contains narcotics.

These are the wrong questions. Both the State of Texas and the Government have based their positions and analyses on the Fourth Amendment of the United States Constitution. Indeed, the Government's brief explicitly states:

> The only issue presented in this case is whether the Fourth Amendment requires a standard higher than or diffrent from probable cause be satisfied to justify the warrantless seizure of an item that falls into plain view during the course of a lawful stop of an automobile or other lawful police activities (Government's Brief, page 8).

It is clear the essence of the complaint by both the State and the Government is that in this case the Texas Court of Criminal Appeals misconstrued the Fourth Amendment of the United States Constitution. The gist of their argument is that "probable cause" is the appropriate standard under the Fourth Amendment to determine whether the evidentiary nature of an item is "immediately apparent" to a police officer who observes that item in plain view and seizes it. This position is supported by the State in a careful analysis with impressive documentation.

The problem, however, is that this is not the issue. In fact, the Defendant agrees with the State's conclusion. A police officer, who is lawfully in a position to see an object which he immediately has "probable cause" to believe is subject to seizure, and the discovery of that object was inadvertent, should, upon such sight, seize the object.

In this case the Texas Court of Criminal Appeals wrote that a police officer seeing only a tied-off party balloon does not have probable cause, on the basis of that sight, and that sight alone, for it to be "immediately apparent" to him that the balloon is evidence of criminal activity. This opinion does not change the standard for Texas police activity. This opinion does not dramatically change anything other than the arrest of people or the seizure of things in Texas, when that arrest or seizure is based solely on the officer's seeing nothing more than an opaque party balloon.

This is a Texas rule that regulates Texas police activity on people and things in the State of Texas. It is a Texas

response to the need of Texas police officers for more definite guidelines in applying the measure of "probable cause" in making arrests or seizures based on these specific, narrow circumstances (J.A. 49).

II. Texas Law as the Basis for This Decision

Regardless of the briefs of the State and the Government this is not a Fourth Amendment case. Both the Texas Constitution and the Texas Code of Criminal Procedure have application here. This section of the argument will address the statutory basis while Section III will deal with the constitutional matters.

Article 1.06
Searches and Seizures

Texas Code of Criminal Procedure

The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation.

Article I, Section 9
Searches and Seizures

Constitution of the State of Texas, 1876

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place or to seize any person or thing, shall issue without describing

them as near as may be, nor without probable cause supported by oath or affirmation.

The opinion of the Texas Court of Criminal Appeals stated clearly that the sole ground of error presented to it involved the denial of the Defendant's Motion to Suppress which it quoted to the effect that the "evidence was seized in contravention of the Fourth Amendment of the United States Constitution, and the Texas Constitution, Article I, Section 9" (J.A. 43). There is no other reference to the Fourth Amendment or any other provision of the United States Constitution anywhere in the opinion. The Texas Court cited *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) and a series of Texas cases including *Howard v. State,* 599 S.W.2d 597 (1979), *Duncan v. State,* 549 S.W.2d 730 (1977), *Nicholas v. State,* 502 S.W.2d 169 (1973) and *DeLao v. State,* 550 S.W.2d 289 (1977), (J.A. 48).

Coolidge was cited for its analysis of the plain view doctrine and the Texas appellate court quoted that opinion for the proposition that ". . . . plain view *alone* is never enough to justify the warrantless seizure of evidence", (emphasis in the original). The four listed state cases illustrate specific application by the Texas court of the general rule laid out in *Coolidge.* The *Duncan* case involved the seizure of a plastic bag that was in a person's pocket, the contents of which could not be seen by the seizing officer; *Nicholas* involved the seizure of photographic negatives that could not be examined without holding them to a light; *DeLao* revolved around the substance inside a red balloon; and the *Howard* case dealt with a brown plastic prescription bottle. Each of these cases represents an instance where the Texas Court of Criminal Appeals has held that the evidentiary nature of the item was not immediately apparent to the seizing officer and therefore the seizure was impermissible.

The Texas Court of Criminal Appeals in its opinion in this cause does not state the basis for its conclusion. Given its analysis, the basis could have been Article I, Section 9 of the Texas Constitution or Article 1.06 of the Texas Code of Criminal Procedure or the Fourth Amendment of the United States Constitution.

It is a basic principle of constitutional law that the Supreme Court of the United States will not pass on a question of constitutionality unless such adjudication is unavoidable, *Spector Motor Service v. McLaughlin,* 323 U.S. 101, 65 S. Ct. 152, 89 L.Ed. 101 (1944). Further, if the United States Supreme Court is faced with two alternative answers to a question, one of them of a constitutional nature and the other of a non-constitutional nature, the non-constitutional alternative will be addressed and the constitutional matter will be avoided, *Alma Motor Company v. Timken-Detroit Axle Company,* 329 U.S. 129, 67 S.Ct. 231, 91 L.Ed. 128 (1946). See also *Sweatt v. Painter,* 339 U.S. 629, 70 S. Ct. 848, 94 L.Ed. 1114 (1950); *Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Fusari v. Steinberg,* 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975); *Wolston v. Reader's Digest Assn., Inc.,* 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Alexander v. Louisiana,* 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); *Califano v. Yamasaki,* 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979); *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977). In *Gulf Oil Co. v. Bernard,* 101 S.Ct. 2193 (1981) this Court

wrote that prior to reaching any constitutional question, federal courts *must* consider non-constitutional grounds for decisions. This principle has been announced by lower courts as well, *Ratcliff v. Estelle,* 597 F.2d 474, Certiorari denied 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979); *Texas v. Grundstrom,* 404 F.2d 644 (1968); and *Woodard v. General Motors Corporation,* 298 F.2d 121 (1962).

This same rule has been applied by the Texas courts, *San Antonio General Drivers, Etc. v. Thornton,* 299 S.W.2d 911, 915 (Supreme Court of Texas, 1957) and *Taylor v. State,* 358 S.W.2d 124, 125 (Texas Court of Criminal Appeals, 1962). See also 12 *Texas Jurisprudence* 2d, Constitutional Law, Section 32, page 377, and cases cited there. Just one year ago, the Texas Court of Criminal Appeals, the court that decided this instant case, wrote in *Ex Parte Salfen,* 618 S.W.2d 766, 770 (1981):

> It is well-settled that the constitutionality of a statute will not be determined in any case unless such a determination is absolutely necessary to decide the case in which the issue is raised. See *United States v. International Union United Auto, Aircraft and Agr. Implement Workers of America,* 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563, Reh. Den. 353 U.S. 943, 77 S.Ct. 808, 1 L.Ed.2d 763 (1957); *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (concurring opinion), and cases there cited; *Bowen v. United States,* 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); *San Antonio General Drivers, Helpers Local No. 657 v. Thornton,* 156 Tex. 641, 299 S.W.2d 911 (Tex. 1957); *Taylor v. State,* 172 Tex. Cr. R. 461, 358 S.W.2d 124 (Tex. Cr. App. 1962).

Article 1.06 of the Texas Code of Criminal Procedure is virtually the same as Article I, Section 9 of the Texas Constitution. Both of them are quoted above. The only difference between the two is a matter of commas and the fact that the statutory provision is in two sentences whereas

the constitutional provision is one sentence with the two phrases joined by the conjunction "and". Yet the presumption should be that the Court of Criminal Appeals applied the statute since, as seen above, the general prohibition against addressing constitutional issues, if they may be avoided, has been adopted by the Texas courts in general and the Texas Court of Criminal Appeals in particular. Thus, in the absence of any information to the contrary, it should be presumed that the Texas Court of Criminal Appeals followed its stated principles and rested its decision on Article 1.06 of the Texas Code of Criminal Procedure.

It is well accepted that the states are free to develop their own standards for searches and seizures which are designed to meet their particular needs and to reflect the wishes of their own particular citizens. These policies "may not, however, authorize police conduct which trenches upon Fourth Amendment rights . . . .", *Sibron v. New York,* 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). The power of a state to impose higher standards for searches and seizures than are required by the Federal Constitution has been acknowledged by this Court in *Cooper v. California,* 366 U.S. 58, 87 S.Ct. 788, 791 (1967), and in *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). Courts in various states have also recognized this as seen in *People v. Brisendine,* 531 P.2d 1099, 1110 (1975) and the cases cited therein.

There is no reason to believe the Texas Court of Criminal Appeals did other than apply its acknowledged and long standing principle by resolving this issue based on the applicable state law: i.e., Article 1.06 of the Texas Code of Criminal Procedure. The construction given to this statute, in this case, does not fall below the minimum guarantees of the United States Constitution, and therefore, should not be disturbed by this Court. The local law of a state has always been taken by this Court as it is announced by the state court

of last resort, *Clarke v. Clarke,* 178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028 (1900); *Taylor v. Leesnitzer,* 220 U.S. 90, 31 S.Ct. 371, 55 L.Ed. 382 (1911); *Independent Warehouses, Inc. v. Scheele,* 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947); *Wardius v. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82, (1973). Even a close division of the judges of the highest court of a state (6-3 in the instant case) does not prevent the opinion of the majority from being conclusive upon the federal courts with regard to the state law involved, *Williams v. Eggleston,* 170 U.S. 304, 18 S.Ct.617, 42 L.Ed. 1047 (1898).

The highest court in the State of Texas construed a Texas statute in resolving the issue in this case.

III. The Texas Constitution as The Basis for this Decision

Article I, Section 9 of the Texas Constitution states:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their pesons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is incontrovertible that the Texas Constitution is, and always has been, a document of independent force. Although the search and seizure provisions of the two constitutions quoted above are similar, this does not deprive the Texas Constitutional provision of its vitality. There is no reason to

believe the search and seizure provisions of the Texas Constitution were intended to merely mirror the Fourth Amendment of the United States Constitution. As noted by the California Supreme Court in *People v. Brisendine,* 531 P.2d 1099, 1113 (1975), long before the adoption of the United States Constitution or its Bill of Rights, many states had enacted provisions in their constitutions providing safeguards against state intrusion into the fundamental rights of their people. The recognition of the importance, even in Revolutionary War time, of the right against unreasonable searches and seizures was demonstrated by the fact it was found in every one of the eight state constitutions adopted prior to 1789 which contained a separate Bill of Rights, 1 Schwartz, *The Bill of Rights: A Documentary History* (1971) quoted in *People v. Brisendine,* supra. As everyone knows, for many decades the state constitutions were the only line of protection of the individual against excesses by local authorities. The role of the state constitutions as guardians of the fundamental freedoms of their citizens is too well recognized and accepted to require further explanation. Deciding that Texas citizens may be entitled to greater protection under the Texas Constitution against unreasonable searches and seizures than is required by the United States Constitution is neither novel nor revolutionary. This is merely a recognition of a basic principle of federalism, i.e., "That the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for the safeguarding of their citizens", *(People v. Brisendine,* supra, at 1114).

Federalism does not require, or indeed even permit, the superiority of the central government over the states in all areas or activities. The history of the United States has shown that maintaining the delicate balance between the national government and the states has not been easy or

without conflict. This court has noted many times the necessity of avoiding needless conflict between the state and federal courts in order to maintain a healthy federalism, e.g., *Elkins v. United States,* 364, U.S. 206, 221, 80 S.Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960). It has, in fact, been acknowledged by this Court that it does not have general supervisory authority over state courts, *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). Finding that both the federal and the state constitutions have similar provisions, as in this case, does not alter this principle unless the state action falls below the minimum federal standard.

It is well established that the state courts are the final arbiters of their own constitutions and laws, *Wardius v. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc. et al,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *Clarke v. Clarke,* 178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028 (1900); *Independent Warehouses, Inc. v. Scheele,* 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947).

While a state court is free to interpret its own constitutional provisions as being more restrictive than those found in the United States Constitution, it may not interpret the Federal Constitution more restrictively than it has been interpreted by this Court, *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). In the *Hass* case this Court reviewed a situation involving compulsory self-incrimination which is provided in the Oregon Constitution, Article I, Section 12, as well as in the Fifth Amendment of the United States Constitution. The opinion of the Oregon Court was based on the United States Constitution and did not cite either the Oregon Constitution or Oregon law. This Court held in the final paragraph of its majority opinion:

> We therefore hold that the Oregon appellate courts were in error when they ruled that Officer Osterholme's testimony on rebuttal was inadmissible on *Fifth and Fourteenth Amendment* grounds for the purposes of Hass' impeachment (at 1221, Emphasis Added).

In the instant case, the TexasCourt of Criminal Appeals did not cite any specific basis for its decision, either federal or state. As argued above, it should therefore be assumed that the Texas appellate court, finding an applicable Texas statute, applied it to the facts of this case and resolved the matter. If, however, the Texas appellate court found it necessary, for one reason or another, to base its decision on a constitutional ground, then surely that basis was found in the provisions of Article I, Section 9 of its own constitution. Having that section, which in essence is the same as the Fourth Amendment, precluded that court's need to go further.

This Court's position in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) is clearly distinguishable from the instant case. In *Prouse* this Court considered whether the arbitrary stopping of an automobile for a license check conflicted with not only the Fourth Amendment of the Federal Constitution but also Article I, Section 6 of the Delaware Constitution. It was found that those provisions of the Delaware Constitution that were comparable to federal constitutional provisions were automatically interpreted by the Delaware courts at least as broadly as were the federal provisions by the federal courts. This court held that where a state constitutional holding depended upon the state court's view of the reach of the Federal Constitution, an erroneous understanding of the federal standard by the state court had to be reviewed and corrected by this Court.

In *Prouse* the Delaware Supreme Court specifically stated that the traffic stop that gave rise to that case violated the Federal Constitution and therefore also violated the Delaware Constitution. In the instant case there is no statement, either explicit or implicit, that the actions of Officer Maples violated the Federal Constitution—or that such a violation would have a domino effect necessarily causing a violation of the Texas Constitution.

The mere fact that the Texas Court of Criminal Appeals cited a federal case in a particular opinion, as it did in the instant case, does not mean the Texas court has abandoned the Texas Constitution to let it become nothing more than a mirror for federal holdings. The mere citation of a federal case by the Texas court does not make it a slave to that decision. Federal cases can be used by the Texas Court of Criminal Appeals for guidance or as a springboard for its own ideas, but that Court retains the right to accept an entire federal opinion, or accept parts of the opinion, or reject the entire opinion, so long as the resulting standard does not fall below the minimum threshold protections provided by the United States Constitution.

IV. **Probable Cause and its Application to this Case**

The acceptance by the Defendant of "probable cause" as the appropriate standard for determining whether the evidentiary nature of an item was immediately apparent to an officer observing that item in plain view does not dispose of this case or the issue. "Probable cause" as a standard to justify a seizure is not an exact test of the litmus paper variety. The term "probable cause" is acknowledged to be "exceedingly difficult to define" (79 *Corpus Juris Secundum*, "Searches and Seizures", at page 863). Actually, instead of

having a single, exact meaning, the term is really only a guideline which then has to be applied to an almost infinite number of specific circumstances.

"Probable cause" cannot be weighed and determined as can be the number of ounces in a pound, or measured as can be the number of feet or yards in a mile. "Probable cause" is dependent on the circumstance and what the individuals involved bring to the determination in the form of training, background, experience and the like.

The determination of the minimum knowledge that will rise to the level of "probable cause" can likewise vary from area to area as well as from subject to subject. As a nation based on federalism, we have a system of government that provides for uniformity where it is required and diversity where it is desired. Such diversity can result in different standards in different areas of the country so long as these do not fall below the constitutionally mandated minimums. The needs and the wants of the people of this country differ and the use of general guidelines, such as "probable cause", allow for this diversity.

The people of the State of Texas, speaking through their elected judges of their highest court, have decided that merely observing a tied-off opaque balloon is not sufficient knowledge to make a Texas police officer sufficiently and immediately aware the balloon is subject to seizure. The holding of the Texas Court of Criminal Appeals in this case clearly shows the narrow scope of their ruling. That Court wrote:

> We hold here that opaque party balloons are to be accorded treatment similar to plastic bags and photographic negatives and translucent vials (J.A. 49).

The reference in this quote to plastic bags was to *Duncan v. State*, 549 S.W.2d 730 (1977); the reference to photographic negatives involved *Nicholas v. State*, 502 S.W.2d 169

(1973); and the translucent vials concerned *Howard v. State*, 599 S.W.2d 597 (1979). In each specific instance the Texas Court of Criminal Appeals had ruled that although the item seized was in plain view, the criminal nature of the item was not immediately apparent to the officer viewing it. In other words, the officer involved did not have probable cause (i.e., sufficient knowledge) to believe the plastic bag, photographic negatives or translucent vial represented evidence of criminal activity. In the instant case, the Texas Court of Criminal Appeals said that opaque party balloons were to be accorded similar treatment. That is, merely observing the balloons was not, in and of itself, sufficient evidence of criminal activity to rise to the level of probable cause.

This holding is further buttressed by the fact that *two* balloons filled with powder were seized from the defendant by Officer Maples that night (J.A. 35-39). One balloon was analyzed and found to contain heroin. One balloon, however, was analyzed and the powder was found not to be heroin. Indeed, the Director of the police crime lab testified he had "no idea at all" what was in that balloon (J.A. 41).

Officer Maples' suspicions that the balloon contained a controlled substance apparently were correct for fifty percent of the balloons he seized. Is being right one-half of the time (and therefore being wrong one-half of the time) sufficient to rise to the level of probable cause? The highest court of the State of Texas said No.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals is based on the laws and the Constitution of the State of Texas and therefore this writ should be dismissed as improvidently

granted. If the writ is not dismissed, the judgment of the Texas Court of Criminal Appeals should be affirmed.

In the alternative, if this Court is not convinced of the above, and there is uncertainty as to whether the decision of the Texas Court of Criminal Appeals was based *solely* on federal constitutional grounds, or if the Texas Constitution or law was a part of the decision making process of the Texas appellate court, then the case should be remanded to that court for clarification of the basis of its ruling. See, Dissenting Opinion of Mr. Justice Marshall in *Oregon v. Hass*, 420 U.S. 714, 726-727, 95 S.Ct. 1215, 1223, 43 L.Ed.2d 570 (1975).

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE STATE OF TEXAS, *Petitioner*

vs.

CLIFFORD JAMES BROWN, *Respondent*

On Writ of Certiorari to the
Court of Criminal Appeals of Texas

Petitioner's Reply Brief

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THE STATE OF TEXAS, *Petitioner*

vs.

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Petitioner's Reply Brief

ARGUMENT

I. Respondent's assertion to the contrary notwithstanding, the Court of Criminal Appeals required a standard of certainty in excess of probable cause in order to justify a plain view seizure.

Respondent concedes that under the plain view doctrine of the Fourth Amendment the standard of "probable cause" is to be used in determining whether it was "immediately apparent" to a police officer that an item was subject to warrantless seizure. However, in section I of his argument, Respondent also states that the Court of Criminal Appeals itself applied a probable cause standard to plain view seizures. This is simply not so. The State petitioned for a writ of certiorari precisely because the Texas court held the seizing officer to a standard of certainty greater than probable cause. The court below said that Officer Maples "had to know" that the tied-off balloon contained contraband. 617 S.W.2d at 200. (J.A. 48). The whole purpose of this proceeding is to determine if in fact there is any constitutional merit to the Texas court's novel, and indeed radical, suggestion that the Fourth Amendment requires knowledge or certainty before a law enforcement officer can seize an item in plain

view which, more likely than not, contains contraband. There is no basis for the assertion that the Court of Criminal Appeals applied a probable cause standard to the facts of this case. The phrase "probable cause" is not even used in the majority opinion.

Respondent is also incorrect in stating that this is a case in which "mere sight" of a knotted balloon was found insufficient to justify a warrantless seizure.[1] Though the opinion below is regrettably vague in terms of analysis, the Texas court mentioned many things beyond "mere sight" of a balloon. The opinion recites that after his first view of the balloon Officer Maples observed empty vials, a quantity of loose white powder, and a bag of balloons in the glove box of the vehicle. It also quotes the officer's description of the tied-off balloon — a description which we do not believe matches that of what Respondent characterizes for the first time as a typical "child's balloon." The court below mentions enough of the relevant facts to show that Respondent brought his heroin-filled balloon into and out of view in a suspicious manner. Inexplicably, the opinion below omits reference to Officer Maples' tes-

[1]We are also somewhat puzzled by Respondent's suggestion in footnote two of his brief that the license check might have been improper on the theory that the officers were not stopping every car that came through the East Allen Street location. A fair reading of the record discloses that the only difference in the way the checks were conducted at the two locations concerned the manner in which the vehicles were funneled to the waiting officers. (J.A. 8-12). Officer Maples asked to see Respondent's license, just as he had asked that of "everybody." (J.A. 12). We also quote from the majority opinion below: "The facts show that Officer Maples stopped appellant's 1970 Buick on the evening of June 18, 1979 as part of a routine and nonrandom license check being operated in the 1200 block of East Allen Street in East Fort Worth." 617 S.W.2d at 199. (J.A. 46). As Respondent admits, he raised no issue below concerning the propriety of the license check; he cannot raise it for the first time now. *See Steagald v. United States*, 451 U.S. 204, 209 (1981).

timony regarding the significance of such a balloon, observed in such unusual circumstances, to an officer familiar with the illegal drug trade. This is not a case where "mere sight" of a knotted balloon is offered as the justification for the seizure. If the Texas court has ever considered such a case, it was in *DeLao v. State*, 550 S.W.2d 289 (Tex. Crim. App. 1977), and not here. This Court, of course, can and will make an independent review of the record to see that the proper constitutional standard was applied and that the proper facts were taken into consideration when applying that standard. *Ker v. California*, 374 U.S. 23, 34 (1963).

The problem in the opinion below is simply that the Texas court required an impermissibly high standard of certainty to justify a plain view seizure and coupled this with a determination that the opaque nature of the balloon was a controlling factor in the analysis. Yet it will be difficult, if not impossible, for officers ever to establish that they "know" that an item is of a kind subject to seizure. And as cases such as *Colorado v. Bannister*, 449 U.S. 1 (1981), *Payton v. New York*, 445 U.S. 573 (1980), and *Warden v. Hayden*, 387 U.S. 294 (1967), make tolerably clear, an officer need have only probable cause to believe that an item in plain view is seizable. The officer cannot reasonably be expected to possess a greater degree of certainty than that. He also must be entitled to rely on his special training and experience as a law enforcement officer in assessing whether probable cause exists. *United States v. Cortez*, 449 U.S. 411 (1981). The opacity of a container is but one factor to be considered when determining whether probable cause as to the contents of the container is present. *Robbins v. California*,

453 U.S. 420 (1981). The Court of Criminal Appeals erred in ignoring these fundamental precepts of Fourth Amendment law.

II. The decision of the Court of Criminal Appeals was based solely on that court's interpretation of the Fourth Amendment to the Constitution of the United States.

Respondent's brief on the merits, like his memorandum in opposition to certiorari, contends that the decision below turned on various provisions of Texas constitutional and statutory law, and that the decision therefore rested on an adequate and independent state ground. An examination of the opinion below will, however, reveal that the Court of Criminal Appeals decided the question as a matter of federal Fourth Amendment law, as evidenced by the fact that at the outset it cited *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), as the controlling authority. The express reliance on this Court's decision in *Coolidge*, coupled with the absence of citations below to Texas constitutional or statutory provisions, establishes the federal basis of the decision and thereby invokes the jurisdiction of this Court. *Oregon v. Kennedy*, 102 S.Ct. 2083 (1982); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Oregon v. Hass*, 420 U.S. 714 (1975). Even if the decision below had rested in part on state law, the Texas court's reliance on, but misconception of, federal constitutional mandates would empower this Court to assume jurisdiction, if only to enable the state court to interpret its own law free of any erroneous view of the analogous federal law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 568.

As soon as the Court of Criminal Appeals acknowledged that the State was relying on the "plain view doctrine" to justify the warrantless seizure of Respondent's tied-off balloon, that court observed:

> Significantly, the state overlooks the first limitation on the "plain view" doctrine: "[T]hat plain view *alone* is never enough to justify the warrantless seizure of evidence." [Emphasis in original] *Coolidge v. New Hampshire*, 403 U.S. 443, 368, 91 S.Ct. 2022, 2039, 29 L.Ed.2d 564 (1971).

617 S.W.2d at 200. (J.A. 48). The Texas court then cited *Coolidge* and its own decision in *Howard v. State*, 599 S.W.2d 597 (Tex. Crim. App. 1979), for the proposition that the "immediately apparent" requirement was "central" to the plain view doctrine. *Howard* was itself based entirely on *Coolidge*, the *Howard* panel opinion expressly stating that it was "following the teachings" of *Coolidge*. 599 S.W.2d at 602. The Texas court referred in the body of its opinion to more of its earlier decisions in the plain view area to justify its current interpretation of the plain view doctrine. These cases likewise trace back to and interpret *Coolidge*. See *DeLao v. State*, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977); *Duncan v. State*, 549 S.W.2d 730, 732 (Tex. Crim. App. 1977); *Nicholas v. State*, 502 S.W.2d 169, 171-72 (Tex. Crim. App. 1973). In footnote three of the opinion below the court also alludes to the "*Taylor* doctrine," in reference to *Taylor v. State*, 421 S.W.2d 403 (Tex. Crim. App. 1967), *cert. denied*, 393 U.S. 916 (1968). Though decided prior to *Coolidge*, *Taylor* relies exclusively on decisions of the federal courts for its resolution of a plain view question. 421 S.W.2d at 407. Respondent cites nothing in these

opinions intimating that Texas has ever, as a matter of state law, adopted either a more "protective" version of the plain view doctrine or a peculiar local definition of probable cause. Finally, Judge McCormick's dissent below cites numerous decisions of this Court to illustrate the error in the majority's analysis, further demonstrating that both factions in the Texas court saw the question as one of federal law.

Moreover, the State can find no place in the legal arguments in the opinion below where the Texas court has even cited, much less relied on, the various state law provisions alluded to by Respondent, those provisions being Article 1, section 9 of the Texas Constitution and articles 1.06 and 38.23 of the Texas Code of Criminal Procedure. Nor are those state law provisions cited or relied on in any of the Texas decisions mentioned in the opinion below.

What the record shows, at best, is that Respondent *offered* supposed state law grounds as possible alternate theories of decision, both in his motion to suppress, (J.A. 3), and in his appellate brief in the Court of Criminal Appeals.[2] However, Respondent has not shown where the court below *accepted* his offer and in fact made state law a basis for its decision.[3] The Texas court did note, in the opening paragraph of its opinion, that Respondent had cited to the state constitution, 617

[2]Though Respondent now cites art. 1.06, TEX. CODE CRIM. PROC. ANN. (Vernon 1977), as a possible state law basis for the decision, the State fails to find where he cited that provision to the courts below.

[3]The Court of Criminal Appeals has demonstrated the ability to base a decision squarely on state law grounds when that is its intent. See *Howard v. State*, 617 S.W.2d 191 (Tex. Crim. App. 1981) (finding state law to be more protective than the federal standard of *Michigan v. DeFellippo*, 443 U.S. 31 (1979)).

S.W.2d at 197, (J.A. 43), but it made no reference whatsoever to state law when it addressed the merits of the seizure question. Respondent as much as concedes the absence of any actual state law ground for the decision when he argues that the Texas court's decision "could have been" based on state law.

The absence of citation to state law and the express reference by the state court to the decisions of this Court led to the rejection of a similar "adequate and independent state ground" argument advanced by the respondent in *Oregon v. Hass*, 420 U.S. at 719-20:

> Although Oregon has a constitutional provision against compulsory self-incrimination in any criminal prosecution, Ore. Const., Art. 1, § 12, the present case was decided by the Oregon courts on Fifth and Fourteenth Amendment grounds. The decision did not rest on the Oregon Constitution or state law; neither was cited. The fact that the Oregon courts found it necessary to attempt to distinguish Harris v. New York, *supra*, reveals the federal basis.

Similarly, this Court said in *Delaware v. Prouse*, 440 U.S. at 653, "[h]ad state law not been mentioned at all, there would be no question about our jurisdiction, even though the State Constitution *might have* provided an independent and adequate state ground." (emphasis added). And in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 568, this Court stated, "That the Ohio court *might have*, but did not, invoke state law does not foreclose jurisdiction here." (emphasis added).

In light of these authorities, and given the absence of references to anything other than federal law in the opinion below, there can be no question but that the Texas

court's decision rested solely on federal constitutional grounds. Yet even if state law were in some manner implicated by the decision, then this case would at a minimum fall within that line of cases in which this Court has accepted jurisdiction because the state court had labored under a misconception of the relevant federal law and thus been improperly "compelled" to decide the state law question as it did. As was said in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 568:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law.

Accord: Delaware v. Prouse, 440 U.S. at 653.

Last term's decision in *Oregon v. Kennedy*, 102 S.Ct. 2083, 2087 (1982), is most pertinent. Like Respondent here, Kennedy had argued that the Oregon decision rested on state grounds, or alternatively that the basis of the decision was so uncertain that the case should be remanded to the state court for clarification of the basis of its decision. This Court rejected the first contention, noting that the Oregon court had relied on decisions of this Court for its statement of the "general rule" which guided its decision, and as here, on a previous state court

decision interpreting federal law. A remand was inappropriate because the extent of the state court's reliance on federal grounds called for this Court to assume jurisdiction under *Zacchini v. Scripps-Howard Broadcasting Co.*, even assuming there was some intermingling of state and federal theories of decision.

The federal basis for the decision below is at least as clear here as in *Oregon v. Kennedy;* we believe it is markedly clearer. This case plainly raises a federal question of which this Court can and should take jurisdiction. Indeed, that Respondent devotes the bulk of his brief to arguing that the decision below rests on state law grounds reveals the perceived weakness of his position on the merits. By contending that Texas has adopted as a matter of state law a more stringent view of the plain view doctrine than the Fourth Amendment itself requires, he tacitly admits that if the decision is in fact grounded on federal law, then the Court of Criminal Appeals has read *Coolidge* too narrowly. For the reasons set out in our opening brief, the State of Texas likewise feels that the court below misinterpreted *Coolidge*. In fact, the decision of the Court of Criminal Appeals represents a radical departure from the basic tenets of Fourth Amendment law, and the error must immediately be corrected.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the State of Texas submits that the judgment of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted,

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October 1982

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AUG 17 1982
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No. 81-419

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF TEXAS, PETITIONER

v.

CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment permits the warrantless seizure of a tied-off balloon observed by a police officer in plain view during a lawful stop of respondent's car, upon probable cause to believe that the balloon contains narcotics.

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the authority of law enforcement officers to seize items that they observe in plain view. Past decisions of this Court and the federal appellate courts have upheld the warrantless seizure of items that are observed in plain view, provided the officer has probable cause to believe that the item is contraband or evidence of a crime and that the officer is located where he has a right to be at the time the item is observed. The Court of Criminal Appeals of Texas has de-

parted from the probable cause standard, holding instead that in order lawfully to seize an item in plain view without a warrant, the officer must "*know* that 'incriminatory evidence [is] before him * * *.'" J.A. 48 (emphasis supplied; citation omitted). In the course of lawful investigative and community caretaking activities federal agents frequently come upon items that they have probable cause to believe are contraband or fruits, instrumentalities, or evidence of a crime. Because certainty as to the incriminating nature of items discovered in this fashion is rarely possible until they are subjected to closer examination or analysis, effective enforcement of the federal criminal laws will be severely hampered unless agents are permitted to seize evidence discovered in plain view whenever they possess probable cause to do so. The holding of the court below represents a radical departure from settled Fourth Amendment doctrine, with great potential for unreasonable interference with federal law enforcement efforts. Accordingly, the United States has a substantial interest in the outcome of this case.

STATEMENT

An indictment returned in the 213th District Court, Tarrant County, Texas, charged respondent with possession of heroin in violation of state law. Prior to trial, respondent moved to suppress the heroin. Following an evidentiary hearing, the district court denied respondent's motion. Respondent then plead nolo contendere to the possession charge, reserving the right to appeal from the denial of the suppression motion, and was sentenced to four years' imprisonment. The Texas Court of Criminal Appeals reversed

the conviction on the ground that the heroin had been illegally seized (J.A. 43-49).

1. The evidence at the suppression hearing showed that on the evening of June 18, 1979, Officer Harold Maples set up a routine driver's license checkpoint on East Allen Street in Fort Worth, Texas. He and his fellow officers stopped every car travelling on the road and inspected the license plate and inspection sticker of each car and the operator's license of each driver (J.A. 6-11). Sometime after 11:00 p.m., Officer Maples stopped a brown Buick driven by respondent. Respondent was alone in the car. In response to Officer Maples' request that he produce his driver's license, respondent reached into his right pants pocket. When respondent kept his hand in his pocket for longer than reasonably necessary to retrieve a license, Maples shined a flashlight inside the car to see what respondent was doing. As respondent withdrew his hand from his pocket Officer Maples noticed that a green opaque balloon, knotted approximately one half inch from the tip, was caught between respondent's two middle fingers. The balloon fell from his hand to the side of his leg (J.A. 12-16).

Respondent next opened the glove compartment to look for his license. Inside the lighted compartment, Officer Maples saw several small plastic vials, a lot of loose white powder, and a bag of party balloons. Respondent rummaged around the glove compartment and finally told Maples that he did not have a license (J.A. 16-18). The officer instructed respondent to get out and to step to the back of the car. As respondent walked to the rear of the car, Maples noticed the knotted balloon lying on the front seat. Officer Maples had participated in numerous narcotics arrests dur-

ing his five and one half years of experience as a patrol officer, including several in which the contraband was found in a balloon. In the year immediately preceding the stop of respondent, Officer Maples had made an arrest in which he recovered eight or nine multi-colored balloons containing narcotics. Based upon his experience and conversations with fellow officers, the officer believed that the balloon on the car seat contained narcotics (J.A. 14-15, 18, 21-22). Officer Maples reached in through the open window and retrieved it. The bulging portion felt as if it contained a powdery substance. Officer Maples silently displayed the balloon to another officer upon the scene. The fellow officer acknowledged that he "understood the situation" (J.A. 18-22, 25, 28).

Officer Maples advised respondent that he was under arrest. Maples called for a tow truck and took an inventory of the passenger compartment of the car. He seized the balloon and vials from the glove compartment, a large bottle of milk sugar from the back floorboard, and several baggies containing a green leafy substance that looked like marijuana. The powder contained in the knotted ballooon was subsequently analyzed and determined to be heroin (J.A. 19-23, 32, 36).

2. At the close of the evidentiary hearing the district court denied respondent's motion to suppress the evidence seized from the car (J.A. 41-42). Respondent was convicted on his ensuing plea of nolo contendere, but the Court of Criminal Appeals of Texas reversed. Purporting to follow *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971), the court held that the seizure of the knotted balloon was not authorized by the plain view exception to the warrant requirement (J.A. 48; footnote and citation omitted):

> For the plain view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. This "immediately apparent" aspect is central to the plain view exception and is here relied on by [respondent] * * *. In this case then, Officer Maples had to know that "incriminatory evidence was before him when he seized the balloon." *DeLao* v. *State*, 550 S.W. 2d 289, 291 (Tex. Crim. App. 1977).

Because it was impossible to be certain from its outward appearance that the seized balloon contained contraband, the Court of Criminal Appeals held that the warrantless seizure of the balloon was impermissible.

Petitioner sought leave to file a motion for rehearing, but this application was denied with three judges dissenting (J.A. 50-54, 55). Speaking for the dissenters, Judge McCormick wrote that the "judicial inquiry [should focus] upon the State's ability to prove the officer has probable cause to *associate* the party balloon with criminal activity. * * * The issue turns on whether an officer, relying on years of practical experience and knowledge commonly accepted, has probable cause to seize the balloon in plain view" (J.A. 51; footnotes omitted; emphasis in the original). Judge McCormick concluded that the record supported a finding of probable cause, noting that balloons are "commonly associated with the distribution, packaging, and transportation of controlled substances—usually heroin" (J.A. 53). He distinguished respondent's tied-off balloon from other items the majority had treated as analogous (J.A. 52-53):

> Photographic negatives can and do represent such diverse subject matters that they cannot

> warrant a "man of reasonable caution" to believe they contain any contraband. Similarly, translucent vials which commonly contain legally obtained prescriptions render the presence of contraband vague and uncertain. The officer knows the vials contain drugs or even narcotics for that is their purported use. However, without other supporting facts, it is this inherent use that prevents the "man of reasonable caution" from having probable cause to believe the presence of contraband.

By contrast, Judge McCormick concluded that here "the incriminating nature of the balloon was immediately apparent" to Officer Maples in light of "his specific knowledge and prior experience with the drug culture," and that the seizure was accordingly lawful (J.A. 54).

SUMMARY OF ARGUMENT

The only issue presented for review in this case is whether, as the Texas Court of Criminal Appeals held, the Fourth Amendment precludes seizure of an item observed in plain view by law enforcement officials, based upon probable cause to believe that it contains contraband or evidence of crime, simply because the officer cannot be certain at the time of the seizure as to the actual identity of the contents seized. The decision of the Texas court is not merely inconsistent with the directly relevant decisions of this Court and of other courts that have considered this issue, it shreds the fabric of applicable general Fourth Amendment principles, producing an anomalous result that threatens wholly unjustified injury to law enforcement efforts. In the specific context of this case, for instance, the court's holding that prob-

able cause is insufficient to support a seizure effectively requires police to allow a container that more probably than not contains contraband drugs to be returned into the community.

1. In *Payton* v. *New York*, 445 U.S. 573, 586-587 (1980), the Court made clear that probable cause is a sufficient level of suspicion to support a plain view seizure. And in *Colorado* v. *Bannister*, 449 U.S. 1 (1980), the Court upheld a plain view seizure on facts similar in material respects to those present here. Moreover, this Court's decisions requiring warrants for certain searches of movable containers, *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), make clear that seizure of an item observed in plain view or in a public place based upon probable cause is permissible. Indeed, any workable view of the warrant requirement presupposes that a warrantless probable cause seizure is permitted while a warrant is sought. A seizure is similarly permissible when the search is one for which no warrant is required.

The plain view doctrine simply recognizes that the privacy protection function of the Fourth Amendment has no application to seizures of items found in plain view or in a public place. Such seizures are in this respect to be distinguished from searches, which do implicate Fourth Amendment privacy concerns. *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351, 354 (1977). Because a seizure implicates only property interests, any injury to which can be fully remedied in a post-seizure judicial proceeding, the reasonableness criterion of the Fourth Amendment is fully satisfied by the simple requirement that a seizure be supported by probable cause.

2. The decision of the court below rests entirely upon an elementary misinterpretation of language

pulled out of context from the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466-467 (1971), which indicates that the plain view doctrine applies only to seizures of items the evidentiary value of which is immediately apparent to police. But even a casual reading of the language in question reveals that Justice Stewart did not mean that certainty or any species of super-probable cause is required to validate a plain view seizure. Rather, the plurality opinion simply reflects the concern that the plain view doctrine not be enlisted as a pretext for conducting unauthorized searches of items that are in plain view but not themselves suspicious. In short, as the courts of appeals have uniformly agreed, the requirement noted in *Coolidge* is simply that the probable cause upon which a seizure rests must be apparent to the officer upon a casual inspection of the item not entailing any additional search.

The plain view seizure in this case was clearly proper. Officer Maples was entitled to be where he was when he observed the balloon in plain view. There is no dispute that he had probable cause to seize the balloon. Accordingly, he acted properly in doing so.

ARGUMENT

THE FOURTH AMENDMENT PERMITS THE WARRANTLESS SEIZURE OF PROPERTY BASED UPON PROBABLE CAUSE TO BELIEVE THAT THE SEIZED ITEM CONTAINS NARCOTICS, EVEN IF THE NARCOTICS THEMSELVES ARE NOT VISIBLE

The only issue presented in this case is whether the Fourth Amendment requires that a standard higher than or different from probable cause be satisfied to justify the warrantless seizure of an item that falls into plain view during the course of a lawful stop of an automobile or other lawful police activity. There

is no claim here that the fixed-point roadblock stop of respondent's automobile was unlawful. Nor would such a claim have merit. See *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979). Consequently, Officer Maples had a right to be standing next to respondent's car as he was when he first saw the knotted balloon. And it is uncontroverted that the discovery of the balloon was inadvertent (compare *Coolidge* v. *New Hampshire*, 403 U.S. 443, 469-473 (1971) (opinion of Stewart, J.)), and that the balloon was plainly visible to the officer from his lawful vantage point.

Furthermore, no question of the validity of any search is presented here. Officer Maples was not searching the automobile when he saw the balloon (see *Ker* v. *California*, 374 U.S. 23, 43 (1963) (opinion of Clark, J.)), and the respondent has not challenged the authority of the state to empty the balloon and assay its contents following its seizure.[1] Indeed,

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[1] So far as we are aware, the record does not reveal where and when the balloon was opened, although it appears that Officer Maples did not do so on the spot (J.A. 30). Even assuming that the balloon was subsequently opened without a warrant, any search entailed is justifiable on several rationales. Examination of the contents of the balloon falls within the automobile exception to the warrant requirement. See *United States* v. *Ross*, No. 80-2209 (June 1, 1982). Once Officer Maples saw the knotted balloon on the seat and the vials, powder and package of balloons in the glove compartment, probable cause focused on the car itself. From the evidence before him, Officer Maples could reasonably conclude that the car was being used as a packaging site for narcotics. Thus, without a warrant, police were permitted to search the automobile, seize any incriminating evidence, and open for further examination any container, including the knotted balloon, that was reasonably suspected of containing evidence or contraband. *Id.* at 19-25. The fact that the "search" of the balloon may not have been conducted at the

the Texas court did not condemn the "search" of the balloon; rather, it deemed the seizure unlawful *ab initio*. But the Fourth Amendment does not require certainty to justify seizures, whether warrantless or otherwise; rather, probable cause is the governing standard. The Texas court accordingly applied the wrong standard to the facts of this case.

1. The decision of the Texas court represents a sharp break with past decisions of this Court. The Court stated in *Payton* v. *New York*, 445 U.S. 573, 587 (1980) (emphasis added), "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is *probable cause* to associate the property with criminal activity." Recently, in *Colorado* v. *Bannister*, 449 U.S. 1 (1980), the Court upheld a warrantless seizure on facts very similar to those of the instant case. In *Bannister*, a police officer stopped a speeding automobile. While talking to the occupants of the car, the officer observed in plain view chrome lug nuts in an open glove compartment and two lug wrenches on the floor of the back seat. 449 U.S. at 2. Because the occupants fit the description of individuals reported to have stolen motor vehicle parts, the officer seized

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scene of the auto search is, of course, of no moment. *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970).

Alternatively, irrespective of its setting in an automobile, a knotted balloon containing a powdery substance may be searched without a warrant because it is rarely associated with anything other than narcotics. Like a gun case or a kit of burglar tools, a knotted, bulging balloon "by [its] very nature cannot support any reasonable expectation of privacy because [its] contents can be inferred." *Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979). Finally, if the balloon was opened at the arrest scene, the search is justifiable as a contemporaneous incident of the arrest. *New York* v. *Belton*, 453 U.S. 454 (1981).

the items. This Court held that "if there was probable cause 'that the contents of the automobile offend against the law,' *Carroll* [v. *United States*, 267 U.S. 132, 159 (1925)], the warrantless seizure was permissible." 449 U.S. at 3 (footnote omitted). The Court explained the rationale for permitting such warrantless seizures (449 U.S. at 3 n.2):

> Another factor that contributes to the justification for the absence of a warrant in such a situation is that "the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable." *Chambers* [v. *Maroney*, 399 U.S. 42, 50-51 (1970)]. See also *Cardwell* v. *Lewis*, 417 U.S. 583, 595 (1974). This factor applies with particular force in this case. As the reason for the stop was wholly unconnected with the reason for the subsequent seizure, it would be especially unreasonable to require a detour to a magistrate before the unanticipated evidence could be lawfully seized.

After reviewing the evidence, the Court determined that the seizure was supported by probable cause and hence was lawful. 449 U.S. at 4.

Colorado v. *Bannister* should control the instant case. Like the officer in *Bannister*, Officer Maples' approach to the side of respondent's car was entirely legitimate; the stop was not a pretext to look for narcotics. Moreover, neither officer undertook a search; the balloon, like the lug nuts, was in plain view. Also, both officers had probable cause to believe that the items before them were evidence of a crime, yet neither officer could be certain that such was the case. Indeed, probable cause was arguably stronger in the instant case than in *Bannister*. Lug nuts and wrenches are not suspicious in and of themselves, and

innocent people commonly possess them. On the other hand, a knotted, bulging, uninflated balloon is almost always connected with narcotics. To be sure, individuals may innocently possess inflated balloons or untied, uninflated balloons; when filled with air or water, a balloon is a common toy. But otherwise balloons are rarely used as repositories for anything except narcotics. Further, the probable cause in the instant case was enhanced by Officer Maples' observation of the powder, vials, and bag of balloons in the glove compartment. Officer Maples was entitled to draw reasonable inferences from all the evidence and deduce that the knotted balloon probably contained an illegal drug. See *United States* v. *Cortez*, 449 U.S. 411, 418 (1981). Indeed, it has long been settled that the kind of certainty that would be necessary to support a conviction is not necessary to justify a probable cause seizure. *Brinegar* v. *United States*, 338 U.S. 160, 173-176 (1949).

In addition to *Colorado* v. *Bannister*, the Court has upheld other warrantless seizures based on probable cause. For instance, in *Warden* v. *Hayden*, 387 U.S. 294 (1967), the officers were searching a house in hot pursuit of a robber when they discovered some clothing of "the type the fleeing man was said to have worn." *Id.* at 298. The officers were permitted to seize the clothing without a warrant because they "could reasonably believe that the items would aid in the identification of the culprit." *Id.* at 307. *Warden* v. *Hayden* thus established that even "mere evidence" may be seized without a warrant upon probable cause.

In *United States* v. *Chadwick*, 433 U.S. 1, 3 (1977), the Court recognized that the Fourth Amendment was not offended by the warrantless seizure of a footlocker

when the agents had probable cause to believe that it contained contraband. Nevertheless, the Court invalidated the subsequent warrantless search of the lawfully seized footlocker, because the Fourth Amendment recognizes a difference between seizures and searches. See also *Arkansas* v. *Sanders*, 442 U.S. 753, 761-762 (1979).

The Fourth Amendment principally protects legitimate privacy interests. See *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 (1978) (Powell, J., concurring). It is ordinarily the search rather than the seizure that intrudes upon that protected interest, and accordingly the warrant requirement is interposed to ensure that only justifiable searches are undertaken. Because the seizure of property from an open place upon probable cause does "not involve any invasion of privacy," and because any unjustified infringement upon property interests due to a seizure can be fully remedied by post-seizure proceedings, a warrantless probable cause seizure does not offend the Fourth Amendment. *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351, 354 (1977). Similarly, police may seize a person upon probable cause in a public place without a warrant (*United States* v. *Watson*, 423 U.S. 411 (1976)), although they must have a warrant to search for that person inside a home in the absence of exigent circumstances. *Payton* v. *New York*, *supra*, 445 U.S. at 590; *Steagald* v. *United States*, 451 U.S. 204, 221-222 (1981).

The plain view doctrine is simply an acknowledgement of this distinction between searches and seizures. It authorizes the warrantless seizure of contraband or evidence upon probable cause when the legality of the means by which the object is discovered is not in question. The discovery may occur in one of two ways: the police may come upon it while lawfully

searching for something else (see, *e.g.*, *Warden* v. *Hayden*, *supra*), or the police may notice the evidence while not conducting a search at all, but instead in the course of some other legitimate activity (see, *e.g.*, *Colorado* v. *Bannister*, *supra*; *Harris* v. *United States*, 390 U.S. 234 (1968) (registration card discovered while rolling up the windows of an impounded car)). A contemporaneous seizure is permitted because "it would be especially unreasonable to require a detour to a magistrate before the unanticipated evidence could be lawfully seized." *Colorado* v. *Bannister*, *supra*, 449 U.S. at 3 n.2. Consequently, a warrantless probable cause seizure of property in open view or in public is "presumptively reasonable" unless it is the fruit of an unlawful search. *Payton* v. *New York*, *supra*, 445 U.S. at 586-587.

2. a. The ruling of the court below that something more than probable cause is needed to support a seizure construes the Fourth Amendment to produce the entirely unreasonable result that police must allow a container that probably contains illicit drugs to be released into the community. This decision rests on a misinterpretation of language taken out of context from the plurality opinion in *Coolidge* v. *New Hampshire*, *supra*. Justice Stewart wrote (403 U.S. at 466; emphasis added):

> Of course, *the extension of the original justification* [for the search or other police presence] *is legitimate only where it is immediately apparent to the police that they have evidence before them;* the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Ignoring the second clause of the quoted sentence, the Texas court interpreted the highlighted text to re-

quire that the police officer must "know" that the item seized is incriminating. As the quoted language in its entirety makes clear, however, the plurality was simply expounding the prohibition against general searches by underscoring that police may not ignore the limitations of a warrant or other authority for their presence in a particular location or vantage point by examining every innocuous article in a location, hoping that closer inspection will disclose that it is related to some crime. If they do so, any discovery of incriminating evidence would raise a question of the lawfulness of the *search* that revealed the incriminating nature of the evidence, and not simply of the lawfulness of the seizure resting on probable cause obtained without a search. Thus, to guard against the conduct of exploratory searches in the guise of "plain view" seizures, the law requires that the suspicious nature of the object that falls into the plain view of the officer must be immediately apparent before it can be seized—but this means nothing more than that the seizure must be based upon probable cause acquired without further search. Read in context, nothing in *Coolidge* supports application of a standard higher than probable cause to determine the lawfulness of a plain view seizure.

The federal appellate courts have uniformly held that probable cause suffices to authorize a plain view seizure. See, *e.g.*, *United States* v. *Chesher*, 678 F.2d 1353, 1357 (9th Cir. 1982):

> [W]e know of no authority suggesting that *Coolidge* requires that an object be conclusively incriminating. We agree with the Second Circuit that "under the plain view doctrine . . . the incriminating nature of an object is generally deemed 'immediately apparent' where police have

> probable cause to believe it is evidence of crime." *United States* v. *Ochs*, 595 F.2d 1247, 1258 (2d Cir. 1979). This is consistent with the rationale for allowing plain view seizures. If the benefit of permitting warrantless seizure in narrow circumstances is avoidance of the inconvenience of obtaining a warrant for inadvertently discovered evidence, *Coolidge*, 403 U.S. at 467-68, * * * it follows that an object's possible relevance as evidence need not be shown to any greater degree than would be sufficient to obtain a warrant were one sought. We hold that if facts sufficient to provide probable cause to believe an object is incriminating are immediately apparent to the officer, the third *Coolidge* requirement is met.

Accord, *United States* v. *Hillyard*, 677 F.2d 1336, 1341-1342 (9th Cir. 1982); *United States* v. *Strahan*, 674 F.2d 96, 100 (1st Cir.), cert. denied, No. 81-6571 (June 1, 1982); *United States* v. *Irizarry*, 673 F.2d 554, 558 (1st Cir. 1982); *United States* v. *Tolerton*, 669 F.2d 652, 654 (10th Cir.), cert. denied, No. 81-6451 (Apr. 26, 1982); *United States* v. *Heldt*, 668 F.2d 1238, 1267 (D.C. Cir. 1981); *United States* v. *Sanders*, 631 F.2d 1309, 1314-1315 (8th Cir. 1980), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Miller*, 608 F.2d 1089, 1099 (5th Cir. 1979), cert. denied, 447 U.S. 926 (1980); *United States* v. *Ochs*, 595 F.2d 1247, 1258 (2d Cir. 1979) (collecting cases). See also, *United States* v. *Scarfo*, No. 81-2181 (3d Cir. July 22, 1982), slip op. 24 (Gibbons, J., dissenting); 2 W. LaFave, *Search and Seizure* § 7.5(b), at 593-595 (1978).[2]

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[2] Because probable cause arose prior to the time Officer Maples touched the balloon, this case does not require the Court to decide the extent to which police may examine any item found in plain view in order to determine whether it is incriminating. Compare, *e.g.*, *United States* v. *Crouch*, 648

Indeed, not even the prior state decisions relied upon by the Texas court (J.A. 48) adopt a standard stricter than probable cause. For example, in *Howard* v. *State*, 599 S.W. 2d 597 (Tex. Crim. App. 1979), the court invalidated a warrantless seizure because "at the moment that the [brown plastic medicine jar] came into 'plain view' Officer Holland had no basis for believing that its contents were inherently suspicious or that they were in fact contraband." *Id.* at 602. In overruling the State's motion for rehearing, the court further explained the basis for its decision: "Holland did not have probable cause to seize the bottle * * *." *Id.* at 605. Likewise, in *Nicholas* v. *State*, 502 S.W. 2d 169 (Tex. Crim. App. 1973), the court suppressed photographic negatives because "the officers had, prior to examining the negatives, neither knowledge nor mere suspicion of an offense related to the film." *Id.* at 172. Hence, neither of these cases at all supports the result reached by the Texas court in the instant case.

Likewise, in the two other cases relied upon by the Texas court, plain view seizures were condemned because the State failed to prove that the items were suspicious to the officers observing them. First, in *Duncan* v. *State*, 549 S.W. 2d 730 (Tex. Crim. App. 1977), the officer saw the defendant slip a plastic bag into his pocket, but the officer was unable to see what

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F.2d 932 (4th Cir.), cert. denied, No. 81-5009 (Oct. 19, 1981), with *United States* v. *Scios*, 590 F.2d 956, 963 n.15 (D.C. Cir. 1978). In addition, because the discovery of the balloon was inadvertent, there is no need to consider the soundness of the suggestion of the *Coolidge* plurality that inadvertent discovery of an item is required for a valid plain view seizure (a suggestion that may in any event be limited to seizures made during the execution of a search warrant naming items other than that seized).

it contained. The court found a Fourth Amendment violation (*id.* at 732):

> In the instant case, the officer was legitimately in position to view any contraband; however, by his own testimony, he did not know what the plastic baggie contained and he expressed no suspicion as to what it might contain.

Also, in *DeLao* v. *State*, 550 S.W. 2d 289 (Tex. Crim. App. 1977), the defendant prevailed because the prosecution had not proved that an officer, who seized a red balloon, knew that heroin is commonly stored in balloons. Nor did it offer any evidence showing that balloons are frequently used in the narcotics trade. Instead, it asked the court to take notice of this fact, which the court refused to do. *Id.* at 291.

b. In contrast to the above cases, the prosecution here provided ample evidence of probable cause. It showed that Officer Maples knew that narcotics are commonly stored in balloons and that he had participated in previous arrests in which such balloons were seized. Indeed, the significance of the balloon was so obvious that when Officer Maples silently showed the balloon to his colleague, he too instantly recognized its incriminating nature. Moreover, Officer Maples' suspicion was buttressed by the narcotics paraphernalia observed in the glove compartment. The totality of the circumstances supplied ample probable cause for the seizure of the balloon. Under the Fourth Amendment no more was needed to permit a prompt, warrantless seizure.

In sum, the Fourth Amendment was not offended by the warrantless seizure of the knotted balloon from respondent's car. The seizure was not the fruit of a search because Officer Maples was lawfully standing next to respondent's car when he saw the

balloon in plain view. Accordingly, respondent's legitimate privacy expectations have not been breached. Officer Maples had ample reason to believe that the balloon contained narcotics. He properly rested his conclusion on his past experience with narcotics traffickers and was not foreclosed from making reasonable inferences about the balloon merely because it was opaque.[3] And insofar as the court below may have based its ruling on the lack of a warrant, that result cannot be squared with the Fourth Amendment; it would have been a needless and unreasonable inconvenience to require other police officers to guard the accessible contraband while Officer Maples secured a warrant authorizing seizure of the balloon.[4]

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[3] Indeed, even if the balloon had been transparent, Officer Maples could not conclusively ascertain that it contained heroin without opening it and testing the contents. Almost any article will require further examination before its evidentiary value may be definitely established. The Court of Criminal Appeals' decision accordingly threatens the viability of the plain view doctrine itself.

[4] Of course such detention of the balloon pending resort to a magistrate could be deemed a seizure as well. The implication of the Court of Criminal Appeals' decision is accordingly that no action could be taken to secure the balloon.

We note that the seizure of respondent's balloon in this case may also be justified as incident to respondent's arrest. *New York* v. *Belton*, *supra*. Because probable cause to arrest respondent on a driving charge, as well as on the drug charge, arose prior to the seizure of the balloon, it is immaterial that the formal arrest followed the seizure. *Rawlings* v. *Kentucky*, 448 U.S. 98, 110-111 (1980). This alternative justification for the seizure simply illustrates the anomalous nature of the ruling below. Similarly, because respondent was the sole occupant of the car and had been lawfully arrested, some seizure of the car and its contents, including the balloon, was undoubtedly a reasonable exercise of com-

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted.

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AUGUST 1982

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munity caretaking responsibilities. *Cady* v. *Dombrowski*, 413 U.S. 433, 443-448 (1973); cf. *South Dakota* v. *Opperman*, 428 U.S. 364, 367-372 (1976). Accordingly, the effect of the decision below is to attribute constitutional significance to the fact that the balloon and automobile were seized separately.

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Docket Sheet

NO. 81-419-CSY	TITLE	Texas, Petitioner v. Clifford James Brown

DOCKETED	COURT
Aug. 28, 1981	Court of Criminal Appeals of Texas

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: C. Chris Marshall
	Counsel for Respondent: Allan K. Butcher
Aug. 28, 1981	Petition for writ of certiorari filed. (Record filed).
Sept. 30, 1981	Motion of respondent for leave to proceed in forma pauperis and brief in opposition filed.
Oct. 5, 1981	Reply brief for the petitioner filed.
Oct. 7, 1981	DISTRIBUTED. 10-30.
June 1, 1982	REDISTRIBUTED. 6-3.(Stricken)
June 7, 1982	REDISTRIBUTED. 6-10.
June 14, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

July 23, 1982	Joint appendix filed.
July 23, 1982	Order extending time to file the petitioner's brief on the merits until Aug. 12, 1982.
Aug. 10, 1982	Brief for the petitioner filed.
Aug. 17, 1982	Brief, amicus curiae for the U.S. supporting petitioner.
Aug. 25, 1982	Order extending time to file respondent's brief on the merits until October 4, 1982.
Oct. 1, 1982	Brief for the respondent filed.
Oct. 7, 1982	Reply brief for the petitioner filed.
Nov. 5, 1982	CIRCULATED.
Jan. 12, 1983	ARGUED.